# The Advocate

**Journal of Criminal Justice Education & Research**
**Kentucky Department of Public Advocacy**

**Volume 23, Issue No. 6 November 2001**

## The Blue Ribbon Group



## Resolution
### 10-1-01

The *Blue Ribbon Group on Indigent Defense for the 21st Century* (BRG) commends the Governor and the General Assembly for their courageous and insightful significant first step toward adequate funding for indigent defense in the 2000 General Assembly. The first phase allowed for an increase in salaries, greater retention of attorneys, some reduction in caseloads, and progress in creating a full-time system. The second phase of the BRG plan includes completion of a fully funded full-time public defender system throughout the state. In light of the historical impact of economic decline, higher caseloads can be expected in the immediate future.

Accordingly, the BRG urges immediate action to fully fund the Public Advocacy system in order to achieve this constitutionally mandated basic service for the people of the Commonwealth of Kentucky.

Robert F. Stephens
Co-Chair

Michael D. Bowling
Co-Chair

*"Improving Indigent Defense for the 21st Century"*

*The Blue Ribbon Group*
~Sponsored By~
Public Advocacy Commission and Kentucky Department of Public Advocacy
100 Fair Oaks Lane, Suite 301
Frankfort, Kentucky 40601
502/564-8006, ext. 108
502/564-7890 (fax)

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## DPA'S PHONE EXTENSIONS

During normal business hours (8:30am - 5:00pm) DPA's Central Office telephones are answered by our receptionist, Alice Hudson, with callers directed to individuals or their voicemail boxes. Outside normal business hours, an automated phone attendant directs calls made to the primary number, (502) 564-8006. For calls answered by the automated attendant, to access the employee directory, callers may press "9." Listed below are extension numbers and names for the major sections of DPA. Make note of the extension number(s) you frequently call — this will aid our receptionist's routing of calls and expedite your process through the automated attendant. Should you have questions about this system or experience problems, please call Ann Harris or the Law Operations Division, ext. 136.

| | |
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Ky DPA's Journal of Criminal Justice Education and Research

*The Advocate* provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

*The Advocate* is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.





**Department of Public Advocacy**
Education & Development
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006, ext. 294; Fax: (502) 564-7890
E-mail: lblevins@mail.pa.state.ky.us

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# FROM THE EDITOR...

*Ed Monahan*

We are proud to bring Kentucky Criminal Justice leaders a wealth of practical information about litigation and policy issues.

**Kentucky Opinions.** What do people in Kentucky think about funding for public defenders? What do they think about the death penalty for children? Statewide polls done by the University of Kentucky Survey Research Center tells us what Kentuckians think on these vital issues.

**Death for Juveniles.** Dr. Kerby Neill tells us the latest research on the development of judgment by juveniles.

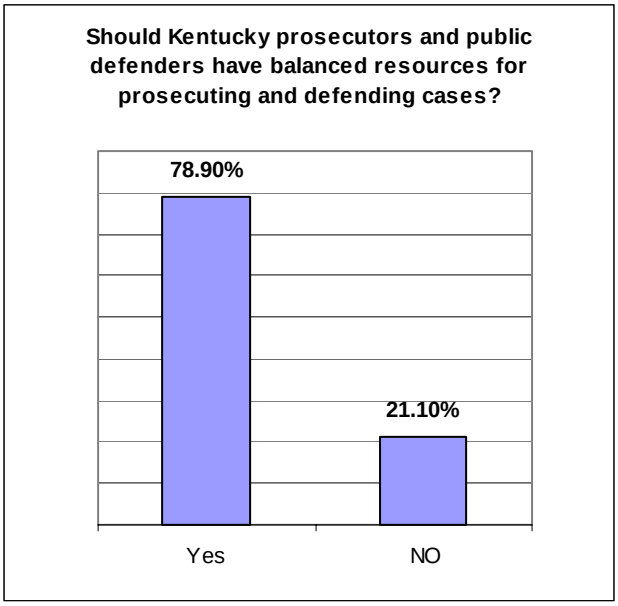
**HB 843.** Dr. Sheila Schuster, in the first of two-part article summarizes the major initiative of the 2000 General Assembly. Take note. This group is doing major planning for Kentucky's criminal justice system in practical and progressive ways.

**Using Protections of State Constitutions.** No less the Chief Justice of the New Mexico Supreme Court points us to using the guarantees of a state constitution when representing our clients.

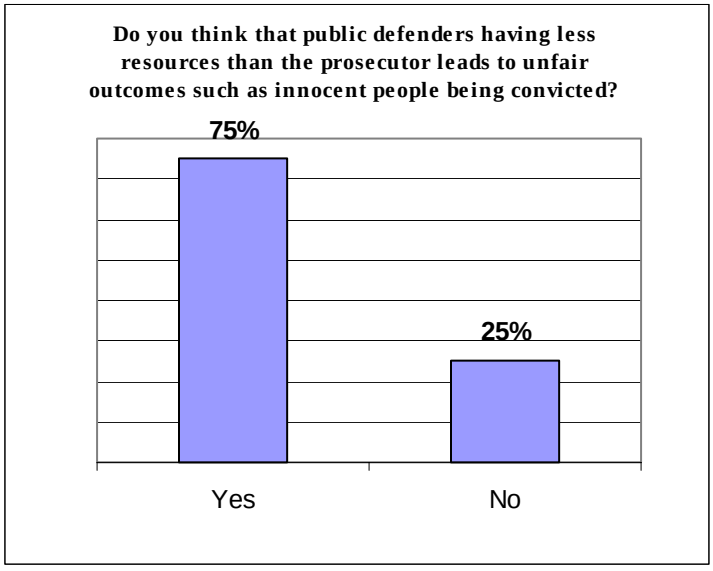
**Parole Realities.** The Parole Board has major affect on the lives of clients we represent. The chair and executive director tell us how they operate and provide their perspective on parole board practice.

**Criminal Justice Recommendations.** A national consensus has formed on key reforms to insure the fair administration of the death penalty. The group making the recommendations after a year of study is comprised of prosecutors, judges, law enforcement, victims and defense counsel. Kentucky would be wise to take note of what they recommend. The Kentucky Criminal Justice Counsel recommends a study of Kentucky's death penalty and DNA changes. Public Advocate Ernie Lewis' DNA concerns were expressed to the Joint Judiciary Committee. The state's major criminal justice planning agency, The Kentucky Criminal Justice Counsel, has made significant recommendations to improve Kentucky's criminal justice system.

## 8 Out Of 10 Kentuckians Want Public Defenders and Prosecutors to Have Balanced Resources




## 75% of Kentuckians Fear Less Resources For Defenders Leads to Risk of Innocent Being Convicted




Results of *Spring 2001 Kentucky Survey* with 841 interviews completed between July 13 until September 7, 2001 by the University of Kentucky Survey Research Center. The margin of error is approximately ± 3.4 percentage points at the 95 percent confidence level.

# Progress Has Been Made Creating A Public Defender System For The 21st Century; Significant Unfinished Business Remains

**BRG Convenes in 1999**. *The Kentucky Blue Ribbon Group on Improving Indigent Defense in the 21st Century* (BRG) was faced with a serious crisis in the delivery of indigent defense services when it met in 1999. The BRG was concerned that from the perspective of every available benchmark, Kentucky's public defender system was in trouble. Entry level public defender salaries were among the lowest in the nation at $23,388. Cost per case was among the lowest in the nation at $187 per case. Funding per capita was among the lowest in the nation at $4.90. The BRG found that without a significant increase in funding, the predicted consequences were dire. The full-time system would fail, lawyers and support staff would leave DPA, caseloads would rise "to the breaking point especially in cities such as Louisville," the DPA would be forced to stop serving some defendants in some courts, cases would have to be retried due to findings of ineffective assistance of counsel, other criminal justice agencies, especially courts, would be frustrated by an inadequate indigent defense system, and Kentucky would be at risk of a successful statewide systemic lawsuit. The BRG recommended that $11.7 million annually be placed into indigent defense in order to avert the crisis.

The reaction to the BRG recommendations was favorable among Kentucky policymakers. The Kentucky Criminal Justice Council endorsed 11 of the 12 recommendations made by the BRG. Governor Patton supported the work of the BRG by placing $10 million into his proposed biennial budget, including $4 million during the first year and $6 million during the second year of the biennium. The General Assembly passed the Governor's budget. Only $5.7 million remains from the original $11.7 to be added to indigent defense in order to complete the BRG recommendations.

The $4 million added to DPA's budget in FY01 and $6 million in FY02 has resulted in great improvement to the Kentucky public defender system. Reviewing each of the crisis benchmarks captures this progress:

- Defender entry-level salaries have increased from $23,388 in 1999 to $33,425 today.
- Funding per-capita has increased from $4.90 in FY98 to $7.14 in FY02.
- Cost-per-case has risen from $187 in FY98 to $250 in FY01.

The added funding also enabled the full-time system to continue to develop at the trial level, as recommended by the BRG. In 1999, 82 counties were covered by a full-time system. Today, 105 counties are being covered by a full-time system. In April of 2002, an office will open in Bullitt County and the Murray Office will be completed, allowing for 5 new counties to be served by a full-time office. By the end of this fiscal year, 110 counties will be part of Kentucky's full-time system at the trial level.

In addition to completing the full-time system, the BRG was also concerned about high defender caseloads. The BRG in Recommendation No. 6 stated that "full-time trial staff should be increased to bring caseloads per attorney closer to national standards. The figure should be no more than 350 in rural areas and 450 in urban areas." In FY99, the average number of new cases opened per attorney that year was 475. By FY01, that average number had declined to 420. Overall, caseloads for the individual full-time trial public defender have been reduced by 11.5% since 1999.

The crisis of 1999 has been averted. The $10 million infusion of General Fund moneys over the biennium has resulted in significant improvement to the Kentucky public defender system.

**BRG Reconvenes in 2001**. On September 26, 2001, the *Blue Ribbon Group* reconvened and reviewed favorably the progress that had been made. In the resolution passed that day (copy on cover of this issue), the BRG commended "the Governor and the General Assembly for their courageous and insightful significant first step toward adequate funding for indigent defense in the 2000 General Assembly. The first phase allowed for an increase in salaries, greater retention of attorneys, some reduction in caseloads, and progress in creating a full-time system."

*The Blue Ribbon Group* recognized that there was unfinished business. The BRG affirmed that the $11.7 million called for in 1999 needed to completed. "The second phase of the BRG plan includes completion of a fully funded full-time public defender system throughout the state." The BRG also saw trouble ahead in the declining economy. "In light of the historical impact of economic decline, higher caseloads can be expected in the immediate future."

The BRG called upon policymakers to complete what the BRG had started in 1999. "Accordingly, the BRG urges immediate action to fully fund the Public Advocacy system in order to achieve this constitutionally mandated basic service for the people of the Commonwealth of Kentucky."

**Two-Step Plan.** The DPA has a two-step plan presented to and affirmed by the *Blue Ribbon Group*. This plan calls for $2.3 million in phase one in order to begin the improvements. The second phase would fully fund the BRG recommendations and would add $5.7 million to the $6 million placed into the General Fund in FY02. ■

# Development of State Constitutional Claims

*The following are the remarks of Chief Justice Patricio M. Serna to the American Council of Chief Public Defenders on Wednesday, April 18, 2001 in Santa Fe, New Mexico*

My topic today is the role of the public defender in preserving a fair, effective and efficient criminal justice system and, more specifically, the development of state constitutional claims.

The role of public defenders is constitutionally created and empowered. A public defender's role in our criminal justice system goes beyond the zealous representation of indigent defendants. A public defender protects the individual rights of defendants and, in doing so, protects the rights of the public at large. In this way, all of you share something in common with prosecutors, whose proper role is not simply to win a particular case, but to ensure a fair trial and a just outcome. An important, emerging tool for a public defender in protecting individual rights is a claim under state constitutions for greater protection than is afforded by the federal constitution.

The supremacy clause of the United States constitution requires state courts to follow federal precedent when the federal constitution provides protection under the fourteenth amendment against the deprivation of an individual right. During most of the 20th century, the New Mexico Supreme Court interpreted the New Mexico Constitution in concert with the federal constitution for questions regarding corresponding provisions, even where the federal constitution did not provide such protection. Like most other courts acting during this time, we applied an interpretation of our state constitution that is called the "lock-step" approach with federal precedent.

However, in 1976, the Supreme Court of New Mexico recognized that it had the inherent power to give greater protection under the New Mexico Constitution. In *State Ex Rel. Serna v. Hodges*,[1] the court concluded that it "was not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution, even in construing provisions having wording that is identical, or substantially so, `unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter.'"[2]

In 1997, the Supreme Court of New Mexico discussed the issue of independent constitutional interpretation at length in *State v. Gomez*.[3] The court compared the lock-step method of interpreting state constitutions to more independent alternatives, known as the Primacy Method and the Interstitial Approach. Under the Primacy Approach, the court does not examine the federal question if the defendant's rights are protected under the state constitution. However, if the defendant's rights are not protected under state law, then the court must address the claim in light of the federal constitution.[4] Many states, such as Maine, New Hampshire, Oregon, and Washington, have followed this type of approach.[5]

***Chief Justice Patricio M. Serna***

Under the Interstitial Approach, the court first determines whether the asserted right is protected under the federal constitution. If the federal constitution protects the right, then the court does not reach the state constitutional claim. If the federal constitution does not protect the right, the court then addresses the claim under the state constitution. *Id.* §19. This is the approach that the New Mexico Supreme Court has adopted. The *Gomez* court concluded that a state court employing the Interstitial Approach may depart from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics. *Id.* Other states have also adopted the Interstitial Approach.

A critical aspect of a successful state constitutional claim is proper preservation in the trial court. As expressed by the Supreme Court of Vermont, "to protect his or her client, it is the duty of the advocate to raise state constitutional issues, where appropriate, at the trial level and to diligently develop and plausibly maintain them on appeal."[6] Public defenders must strive to create an adequate record in order to benefit their clients in appellate review and in order to lay the foundation for the possibility of the expansion of individual rights under the state constitution. Rule 12-216(A) of the New Mexico Rules of Criminal Procedure, like analogous provisions in other states, requires a defendant to fairly invoke a ruling or decision by the trial court in order to preserve a question for appellate review. As emphasized by the *Gomez* court, "a trial is first and foremost to *resolve* a complaint in controversy, and the rule recognizes that a trial court can be expected to decide only the case presented under issues fairly invoked."[7]

Although the *Gomez* court declined to require litigants to discuss specific criteria for departing from federal interpretation in the trial court, some state courts have utilized such criteria, and practitioners may find it helpful in formulating state constitutional arguments. Justice Handler, of the New Jersey Supreme Court, described some factors which justify expansion of the state constitution regarding individual rights, including issues related to particular state or local concern, state tradition, and differences in textual language

between the federal and state constitution.[8] Justice Handler astutely observed that the criteria "share a common thread -- that distinctive and identifiable attributes of a state government, its laws and its people justify recourse to the state constitution as an independent source for recognizing and protecting individual rights." *Id.* at 967.

Barry Latzer, author of *State Constitutions and Criminal Justice*, researched the extent to which state supreme courts have extended rights beyond the federal constitution based on interpretations of their state constitutions between the 1960's and 1989, and found that the Supreme Courts of Alaska, California, Florida and Massachusetts are the most active in the expansion of state constitutional rights.[9] Another legal commentator has suggested that state courts' expansion of individual rights under state constitutions in the area of search and seizure may be in response to the U.S. Supreme Court's creation of numerous exceptions to the fourth amendment's warrant requirement, which reduced federal protection.[10] For example, our opinion in *Gomez* requires a showing of exigent circumstances in order for a warrantless search of an automobile; to be permissible under the New Mexico constitution.

Giving greater protection to individual rights in the context of criminal law benefits not only defendants, but may also improve the public's perception of fairness in the criminal justice system. I urge you to further your clients' interests by ensuring that any state constitutional claim that you believe to have merit is properly preserved in the trial court in order to allow appellate courts to fully and fairly review these issues.

**ENDNOTES**

1. 89 N.M. 351, 355, 552 P.2d 787, 791 (1976) , *overruled in part on other grounds by State v. Rondeau*, 89 N.M. 408, 412, 553 P.2d 688, 692 (1976)).
2. *Hodges*, 89 N.M. at 356, 552 P.2d at 792 (quoted authority omitted).
3. 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.
4. Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of state Constitutional Law*, 63 Tex. L. Rev. 1141, 1170 (1985).
5. *Gomez*, 1997-NMSC-006, § 18.
6. *State v. Jewett*, 500 A.2d 233, 238 (Vt. 1985).
7. *Gomez*, 1997-NMSC-006, § 14.
8. *State v. Hunt*, 450 A.2d 952, 965-67 (ICJ. 1982) (Handler, J., concurring).
9. Barry Latzer, *State Constitutions and Criminal Justice*, 166 (1991).
10. James N. G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 Alb. L. Rev. 1183, 1196 (2000). ■

# Practice Tips from the Kentucky Parole Board

*John Coy*

*Keith Haridson*

In Kentucky parole is a privilege and the denial of such has no constitutional implications. *Land v. Commonwealth*, Ky., 986 S. W. 2d 440 (1999). Seriousness of the offense alone is a sufficient basis to deny parole. *Belcher v. Kentucky Parole Board*, Ky. App., 917 S. W. 2d 584 (1996). A finding that relevant criteria have been met does not *require* the Parole Board to release an inmate prior to the expiration of his or her sentence. *Garland v. Commonwealth*, Ky. App., 997 S. W. 2d 487 (1999). It would appear there is little to be done for your client so far as parole is concerned. That may well be true if parole is viewed as simply a win-lose matter. However, there are some things you can do to assist your client with the Kentucky Parole Board and about which he or she should be advised.

**Insure the accuracy of the Pre-Sentence Investigation Report (PSI).** See RCr 11.02 and KRS 532.050

The PSI is the primary document by which your client will be measured by the Department of Corrections and the Parole Board. The information contained in the PSI affects custody level, program availability, and the over-all view taken of your client. It is not enough to ask your client to read the PSI and express any disagreement. Be sure the crime story is a fair statement of the facts and circumstances of the crime. Be sure the reported criminal history is correct and applies to your client and not someone with the same name or another family member. Be sure the family and social history, as well as the mental and physical history are accurate and do not contain derogatory statements of opinion. Your client will be asked if he or she wishes to make a statement to be included in the PSI. "No comment" would be better than an obvious untruth or rancorous display of disrespect for authority.

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If there are particulars of a plea agreement that you want the Board to be aware of try to get it included in the PSI. If you cannot get inaccuracies removed from the PSI, or if you cannot get things included you feel should be, prepare a separate document and ask that it be appended to the PSI. If you can't get that done, forward the information to Department of Corrections, Offender Information Services, P.O. Box 2400, Frankfort, Kentucky 40602-2400 by separate correspondence.

**Be aware of parole eligibility, or time to serve to become eligible for parole consideration.** See 501 KAR 1:030, KRS 439.3401 and KRS 532.080

Those who commit crimes while on parole can expect harsher treatment upon conviction. *Devore v. Commonwealth*, Ky., 662 S.W. 2d 829 (1984) *cert den'd* 105 S. Ct. 132. By statute, a new sentence for a crime committed while on parole must run consecutively with the previous sentence. KRS 533.060 (2). The parolee is not eligible for probation on the new conviction. Commitment for a new felony committed while on parole automatically (without a hearing) revokes the previous parole. KRS 439.352. Furthermore, recent changes in the regulations make it clear that a parolee who receives a new sentence with a statutory minimum parole eligibility, *e.g.* a violent offense pursuant to KRS 439.340 (1), will not be reviewed for parole again until he or she has served the statutory minimum calculated from the date of the new conviction, minus jail credit. Hence, counsel must be aware of the client's status with regard to prior convictions.

Time that must be served to become eligible for parole consideration for certain statutorily defined violent offenders is 85%. Commitment on a PFO I conviction in connection with a Class A, B or C felony requires serving ten years to become eligible for parole. Most other sentences require serving 20% of the sentence to become eligible for parole. The Offender Information Services Branch of the Department of Corrections issues a certification of parole eligibility each year. A reproduction of the Certification of Eligibility was published in the last issue of *The Advocate*. Regulations adopted in September will make a few changes in the Certification of Eligibility.

The new regulations provide that those who are within 60 days of completion of the service of their sentence will not be seen. The reason for this is that, most likely, the inmates will be released before the paperwork on their parole can be processed. Since a parolee serves on parole until their maximum expiration date, but will be released by minimum expiration (their total sentence minus good time), many inmates nearing the end of their sentence don't want parole. Even if they did, a brief few months of "shelf time" are not enough to provide much incentive for good conduct.

**A parole hearing is a non-adversarial proceeding, and no one may participate other than the inmate and the Board.** Inmate interviews are open hearings and anyone who makes prior arrangements with the institution where the hearing is being held may attend. However, no one is allowed to speak or participate in the hearing other than the Board and the inmate.

**A denial of parole may be reconsidered.** See 501 KAR 1:030 Section 4 (4)

An inmate whose parole is revoked, rescinded or denied by deferment or serve-out, or the inmate's legal representative, may request that the Board reconsider its decision. The request must be in writing and be postmarked no later than twenty-one days from the date the decision is made available to the inmate. The only bases for review are (1) significant new evidence not available at the time of the hearing, (2) misconduct by a Board member substantiated by the record and (3) significant procedural error by a Board member.

Requesting reconsideration is an administrative remedy which must be exhausted prior to legal action.

**Don't insist on a preliminary revocation hearing unless you have matters to present which would negate probable cause to believe your client violated conditions of parole.** See KRS 439.341, 501 KAR 1:040 and *Morrisey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972)

When your client is released on parole he or she gains an expectancy of continued freedom which may not be taken away unless due process is afforded. In Kentucky this due process requirement is met through a preliminary revocation proceeding conducted by an Administrative Law Judge (ALJ) of the Kentucky Parole Board. The standard of proof in a preliminary revocation hearing is probable cause. The only defense to violation of conditions of parole is *non est factum*. (Possibly there are jurisdictional or esoteric defenses we can't think of, but the usual criminal defenses don't apply.) Everything else you might want to present is in mitigation. If it is clear your client has violated the conditions of parole and mitigation evidence is not unusually strong, don't have a hearing and hope that lightning might strike. Your time can be better spent helping your client draft a cogent and concise mitigation statement, because clients rarely do a good job preparing them. The Board will read the mitigation statement at the final revocation proceeding, and if truly mitigating factors are present it will have an impact on the Board's decision.

**If you have a legitimate defense don't waive the preliminary revocation hearing thinking you will have a chance to present your case at the final revocation hearing.** See 501 KAR 1:040 Section 5 and Section 6

A waiver of the preliminary hearing is an admission of guilt as to the violations charged. If you have a legitimate defense present it to the ALJ.

*Laurrece Carter-Hatchett*
*Member, Parole Board*

*Robert Milburn*
*Member, Parole Board*

Final parole revocation hearings are held within 30-days of the inmate's return to prison. Compared to the preliminary hearing, these hearings are less formal. Normally, counsel is not present and witnesses are not called. A parolee may request what is known as a "special hearing" to present new or different information than presented at the preliminary hearing. The parolee must show that this information could not have been presented at the preliminary hearing. The grant or denial of a special final hearing is discretionary. 501 KAR 1:040 (6). The special hearings follow a format set forth by regulation. 501 KAR 1:040 (7).

**Neither the Parole Board nor the Department of Corrections is a party to the criminal proceeding against your client.**

Orders entered in a criminal indictment proceeding directing the Department of Corrections or the Parole Board to take or not take action are ineffective. We are not a party.

**The Rules of Criminal Procedure do not apply to Parole Board proceedings.**

The Parole Board is an administrative body within the Executive branch of state government. Our procedures are contained in Chapter 439 of the Statutes and 501 KAR 1:030 and 1:040.

Possibly, the best service you can provide for your client is to help him or her get information before the Board. Sincere expressions of family and community support are helpful. Specific information concerning plans for support, such as an offer of a job or home placement immediately upon release are helpful. Information regarding the availability of treatment and a treatment plan for a behavior problem that was a major factor in your client's incarceration would be pertinent. Support systems to help with rehabilitation would be looked upon favorably by the Board.

On the other hand, vague character references from persons who are uninformed about the individual or their circumstances are far less helpful. Pleas concerning the "raw deal" the individual got in court or the procedural errors of his trial have no pertinence to the Parole Board decision and may even cloud or obscure information that is pertinent.

There is no magic formula for getting information before the Board. There are no rules of procedure and no particular format for the information. Letters supporting an inmate's parole, as well as those opposing, are added to the file maintained by the Department of Corrections. This file is one of those reviewed by the Board at the time of the inmate's interview. Multiple copies of correspondence are unnecessary. Handwritten letters, typewritten letters and letters from attorneys are all handled the same way. No specific time limits are imposed. The important requirement is to get the information to a Board or the Department of Corrections in time for it to be added to the file before the day of the hearing. A few weeks before the hearing are adequate. If the information cannot be sent before then it can be faxed.

The Board does not consider information produced orally. The Board will not discuss the merits of a case prior to the parole interview. Phone calls desiring such are rejected. Remember, the quality of information is not judged by its volume or weight. Be brief, concise and to the point. Refrain from being over lawerly and make your points as if you were explaining them to a friend or neighbor.

If you anticipate seeking judicial review of a Parole Board decision you must remember to preserve your administrative record. This can be done by a timely letter. The Board does not have motion practice or briefing schedules.

**The opportunity for judicial review of a Parole Board decision is extremely limited.** KRS 439.340 and 501 KAR 1:030, Section 4 (1).

The Board can consider evidence not admissible in court. The courts in Kentucky generally grant great deference to administrative agencies in adjudicatory matters. As to the Parole Board, this deference has been codified at KRS 439.330 (3) ("The orders of the Board shall not be reviewable except as to compliance with the terms of KRS 439.250 to 439.560.")

Procedural obstacles make it difficult to get judicial review of a Parole Board decision. Case law specifically requires that action-seeking relief from a Parole Board decision be brought by way of mandamus. *Shepherd v. Wingo*, Ky., 471 S.W. 2d 718 (1971) and *Allen v. Wingo*, Ky., 472 S.W. 2d 688 (1971). Courts rarely second-guess a discretionary decision. *Evans v. Thomas*, Ky., 372 S.W. 798 (1963). Courts reviewing actions such as those taken by the Parole Board use a modified summary judgment standard whereby the decision of the administrative tribunal is reviewed based on the record already made with great deference given to the fact finder. *Smith v. O'Dea*, Ky., 939 S.W. 2d 353 (1997). It is risky to expect the court to intervene in a Parole Board matter.

**Control the behavior of your client and your client's family toward the victims and victims' families.** See KRS 349.340 (5), (6) and (7) and KRS 532.055 (2) (a) 7.

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Victims and their families have the opportunity to make known to the Board the impact of the crime upon them, and your client or your client's family cannot enhance his or her position by threats, taunting or disrespect.

**Be courteous and respectful in your dealings with the Board and those employed at the Board.**

Be aware that the best interests of your client dictate that you not alienate those you deal with at the Board. Threats to sue are unoriginal and don't get anything accomplished for your client.

**The chances of your client making parole cannot be actuarily determined.**

Without knowing the search criteria used to obtain figures, there is no way to know what the figures represent. We see various charts and figures published which, evidently, purport to give some idea of the chances of making parole. Offenders are grouped in various ways such as all offenders, drug offenders, length of sentence, first time up for parole and so on. Possibly such figures are beneficial to some lawyers in some cases, but they tell you nothing about your individual client. "All Offenders" presumably includes both the person who caused the death of another and the person who shoplifted $301 worth of school clothes for her child. Many of those represented in the charts have committed an extremely serious offense and plea-bargained it down because the prosecutor had proof problems or the victim refused to testify. Many of them have other crimes connected with their sentence. Treated and untreated sex offenders and PFO's are included. Drug offenders include both the hapless addict passed out in the corner of the room when the crack house was raided and the guy from Miami parked out front in the Jaguar loaded with many kilos, weapons and dollars. It includes the meth lab that blew up and burned down the neighborhood and it includes ten immature marijuana plants sitting in the kitchen window. The charts and figures include those probated two or three times and those never probated. They includes those with extensive criminal histories and those with no criminal history. Raw numbers and percentages are not predictive of anything. Raw numbers are what are being published, not actuarial tables.

The Board is often asked why such a small number of inmates with one or two year sentences are being paroled. We can't speak for the workings of the mind of each individual board member; however, we do have some thoughts on the matter. At first blush, those with lesser sentences would appear to be the better candidates for parole. However, that same reasoning made them better candidates for probation, and by the time the Board sees them many have already shown that they have problems on supervision. A person who receives a one or two year sentence does not have time to complete any formal rehabilitative programming either incarcerated or on the street, and the few months left until minimum expiration are not a great incentive for good behavior on supervision.

The mechanics of transferring an inmate into and out of the institution greatly limit the Board's options on the shorter sentences. When transferring in, credit for jail time can do strange things to a sentence. The inmate may be immediately eligible for parole and have a minimum expiration date that same month. You have seen clients who served out on the date of sentencing. When transferring out on parole the inmate must have a home and job placement approved by the Probation and Parole Branch. It takes the inmate time to obtain these placements and for them to be approved.

Many of the inmates who receive shorter sentences do not desire parole. Here's why. A person receives a one-year sentence on January 1, 2002. Pursuant to KRS 197.045 the Department of Corrections reduces the sentence by 25% up front. This is called "good time" and is used to control the behavior of the inmates. Poor institutional behavior can result in loss of "good time." So, your client gets a sentence reduction of 25% (90 days or 3 months per year) going in. His conditional release date (minimum expiration of sentence) on a 1 year sentence is October 2002. His final discharge date (maximum expiration of sentence) is January 2003. His parole eligibility date (4 months on a 1 year sentence) is May 2002. He can go home, no strings attached in October, or, if pa-

***Lutitia Papailler***
***Member, Parole Board***

***James Provence***
***Member, Parole Board***

***Verman Winburn***
***Member, Parole Board***

roled, he can be "on paper" (supervision) from May 2002 until January 2003. A person receives a two-year sentence on January 1, 2002. He gets 25% off the top. His minimum date is July 2003. His max date is January 2004. His parole eligibility date (20% of sentence) is June 2002. He can go home, no strings attached, in May 2003 or, if paroled, be "on paper" from June 2002 until January 2004. If he behaves his sentence may be reduced 60 more days ("meritorious good time" KRS 197.045) at the end of the first year. Other things enter into the equation, especially from the inmate's viewpoint. The time "on paper" only counts toward expiration of sentence if the period of supervision is successfully completed. KRS 439.344 If he violates he is reincarcerated with the same amount of time remaining as when he went out.

From the perspective of a Parole Board member who has practiced criminal defense, being aware of how sentences are calculated and minimum and maximum dates should be more useful to a defense attorney than raw numbers and percentages. The knowledge can be used to advise and counsel with a client about what is best for that individual client. Your client needs the information to make an informed decision as to whether or not he or she wishes to be paroled and on supervision for one hundred percent of the sentence or wishes to serve 75%, possibly less, and be released with the "debt to society" paid in full.

Counsel with your client about matters that indicate he will have problems on parole supervision. For instance, has he already shown that he has a hard time making it on supervision by violating conditions of probation? Is he a substance abuser? A beer in the refrigerator might get him violated. Does he have an extensive history of contact with the court system? A misdemeanor conviction violates his conditions of supervision. You have a good idea whether or not your client is fit for parole and whether or not he can successfully complete a period of supervision. Many of your clients are aware that they can't make it on parole and request the Board to serve them out.

It is a part of our Western culture to seek to quantify. When faced with the unquantifiable, we search for something to hang our hat on. Don't hang it on raw numbers and percentages. You have a law degree, you have practiced in the criminal courts, and you have represented many people accused of crime. Very carefully go over your client's PSI. Look at the facts and circumstances of the crime or crimes as related in the PSI. Look at your client's criminal history. Are there juvenile convictions, misdemeanor convictions, history of assaultive behavior, history of violence, history of substance abuse and committing crimes while under the influence of alcohol or drugs; does your client have prior felony convictions and what is the history of performance on supervision? What is the work history and is there family support? What rehabilitative programming is likely to be recommended in the institution and how long does it take to complete? Is treatment needed for substance abuse; is he or she a sex offender; does he or she lack employment skills or cognitive skills or a combination of these? Now, based on your education, training and experience, advise your client as to whether the prospects for parole are good, fair or poor and truthfully state what your opinion is based on. You will have counseled much more effectively than if you told your client that he or she belonged to a broad and loosely defined group out of which 5% made parole the first time up, and X percent made it the second time up etc. Percentages don't mean anything to your client; he's the man in the barrel.

*Sandra Downs*
*Member, Parole Board*

*Theodore Kuster*
*Member, Parole Board*

**Don't waste your valuable time trying to second-guess why the Board made the decision it did.**

Quite often the Board has information about your client that you don't have, and for safety and security reasons, much of it is not subject to open records laws.

The Board begins its deliberations with the realization that every incarcerated criminal, other than those awaiting execution and some of those serving life sentences, are eventually going to return to free society. The things demanded of the Board at different times and from different groups are: (1) punishment of the guilty, (2) rehabilitation of the offender, (3) deterring others from committing crimes, (4) protecting innocent citizens from being victimized by convicted criminals, and (5) returning offenders to the community as productive citizens. Society demands that these things be done in a humane manner and without violating basic rights. The management and staff of the penal institutions quite rightly expect the Board to not make decisions that will have an adverse impact on the behavior of the inmates. Often, these are conflicting goals and interests, yet all are valid concerns within the framework of a reasonably safe and orderly society. At times the Board agonizes over individual cases in its attempts to address the valid concerns of all.

After reading the foregoing your question, still, is how can my client make parole. Step back for a moment, take off your lawyer hat if possible, and look at your client objectively. The simple truth is that some convicted felons will never be fit candidates for release. You can recognize them as well as the Board. On the other hand, if your client doesn't fit that category, the way for him or her to make parole is to have good institutional behavior and take advantage of programs

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offered in the institution. Your client must resolve no later than the day of sentencing to not pass that way again. This attitude must be maintained even in the face of discouragement, such as if the Board thinks your client should spend more time incarcerated than you and your client think is proper.

That's it. No magic, no obscure points of law, no surprise witnesses to save the day. A "win" for you, your client, the Department of Corrections, the Parole Board, the prosecutor, the public, a win for everyone, is for your client to earn early release and leave the institution better educated, with some handle on a substance abuse problem and with a skill, then to abide by conditions of parole and successfully complete the sentence under supervision, going to work, paying taxes and supporting a family. ■

**John Coy**
**Parole Board Chairman**
**P.O. Box 2400**
**Frankfort, KY 40602-2400**
**Tel: (502) 564-3620; Fax: (502) 564-8995**

**Keith Hardison**
**Executive Director**
**P.O. Box 2400**
**Frankfort, KY 40602-2400**
**Tel: (502) 564-3620; Fax: (502) 564-8995**

# HB 843
# Strategic Planning for Comprehensive Mental Health and Substance Abuse Services in the Commonwealth

**Background:** The release in 1999 of the U.S. Surgeon General's Report on Mental Health marked the first time that this Federal office had focused on mental health as part of the health care system across America. As a result of this national focus, of growing advocacy to end insurance discrimination against mental health treatment, and the attention brought about by headlines linking mental illness with violence and with the "revolving door phenomena" of hospitalizations – release – re-hospitalizations – arrests – life on the streets, legislative and advocacy focus was sharpened. Advocates, providers, consumers and family members wanted to take a proactive, long-term approach to meeting the needs of the mentally ill in Kentucky.

Legislation was filed in the 2000 General Assembly session to take a comprehensive, regional approach to identifying the needs, the gaps in services and making recommendations which would bring about system changes. HB 843, sponsored by Rep. Mary Lou Marzian (Louisville) and co-sponsored by Reps. Barbara White Colter (Manchester), Dennis Horlander (Louisville), Susan Johns (Louisville), Eleanor Jordan (Louisville), Kathy Stein (Lexington), and Brent Yonts (Greenville) passed the 2000 KY General Assembly with unanimous votes in both chambers. Because the legislation carried an Emergency Provision, it became law upon Governor Patton's signature on April 21, 2000.

**HB 843 Regional Process:** The 14 Regional Mental Health/ Mental Retardation Boards (known as Comp Care Centers) were established in 1964 under KRS 210 as the "safety net provider" and planning entity for the provision of services in each region. HB 843 directed the Comp Care Centers to convene Regional Planning Councils to survey the needs in their area and to generate recommendations to meet those needs. Literally thousands of Kentuckians accepted the invitation to join the councils or to participate in the needs-assessment and planning processes.

The composition of the 14 Regional Planning Councils as set out in HB 843 included at least two representatives of: consumers; family members; public and private sector providers, facilities and agencies; community leaders; law enforcement and judicial personnel; educators; physical health care providers and facilities; and advocates. In most of the regions, the Planning Councils had more than two representatives in each category. Although operating under a very tight timeline, the councils did a thorough assessment of the needs in their region, utilizing a variety of techniques including surveys, focus groups, and public forums. Data was collected from a number of sources, both public and private.

Following a template developed by all the stake-holders, the Regional Planning Councils prepared their reports. Each region identified the prevalence of mental illness and substance abuse disorders and the at-risk populations. They described the system of care in their region and the gaps in the delivery system. The Regional Planning Councils submitted their written reports and recommendations to the Statewide Commission on December 21, 2000. Several weeks later, on January 3 and 4, 2001, the Statewide Commission received oral summaries of the Regional Planning Council reports, devoting the bulk of two days to hear the testimony.

**HB 843 Statewide Process:** HB 843 also established the Kentucky Commission on Services and Supports for Individuals with Mental Illness, Alcohol and Other Drug Abuse Disorders and Dual Diagnoses. The Commission was composed of six legislators and 14 Executive Branch representa-

tives from Cabinets and Departments which deal with individuals with mentally illness and/or substance abuse disorders in the state. The Commission was staffed through the Department of Mental Health/Mental Retardation Services.

The Statewide Commission was co-chaired by Rep. Mary Lou Marzian and Secretary Jimmy Helton from the Cabinet for Health Services (later replaced by Secretary Marcia Morgan). In addition to Rep. Marzian, the legislators included: Senators Charlie Borders (Ashland), Dan Kelly (Springfield) and Ed Miller (Cynthiana) and Representatives Barbara Colter and Bob Damron (Nicholasville). Also serving on the Commission were representatives of the Cabinets for Families and Children and for Justice, and the Departments of Mental Health/Mental Retardation Services, Medicaid Services, Education, Protection and Advocacy, Corrections, Juvenile Justice and Vocational Rehabilitation. The Statewide Commission met for the first time in September 2000.

**Prevalence:** Findings in Kentucky were consistent with the U.S. Surgeon General's 1997 report on mental health which found that 21% of Americans have experienced a mental health problem. This was also consistent with a statewide telephone survey of 1,500 Kentucky households conducted in 1990 which found that one in five Kentuckians had experienced (or had a family member who has experienced) a mental illness or substance abuse disorder or both.

The Regional Planning Councils recognized the high costs to businesses in poor productivity and to society in general for untreated mental illness and substance abuse disorders. National studies demonstrate that cost:

- The MIT Sloan School of Management reported in 1995 that clinical depression costs American businesses $28.8 billion a year in lost productivity and worker absenteeism.
- As many as 40% of industrial fatalities and 47% of industrial injuries can be linked to alcohol or other drug usage.
- The National Human Resource Association in August 1999 stated that untreated clinical depression is the #1 problem in the workplace. This disorder results in high absenteeism and worker turnover, coupled with low productivity.

Data from the KY Department of Corrections indicated that they estimated that over 60% of Kentucky's incarcerated adults and adolescents have a substance abuse or mental health disorder.

The Kentucky Division of Substance Abuse recently released an outcome study conducted by the University of Kentucky which showed that for every dollar spent on substance abuse treatment in Kentucky, the financial burden on taxpayers was reduced by $8. This cost saving is yielding a reduction of the tax burden on Kentucky citizens by $160 million per year. Similar findings of reduced absenteeism and increased workplace productivity as a result of substance abuse treatment have been reported in other states.

**Funding:** Kentucky currently ranks 44th nationally in per capita spending on mental health and substance abuse services, based on state general fund dollars allocated through the Department of Mental Health/Mental Retardation Services. Kentucky is one of only a handful of states which does not extend its Medicaid services to include the diagnosis and treatment of substance abuse disorders in all Medicaid-eligible populations. Currently, Medicaid will pay only for the treatment of substance abuse in pregnant women and women of childbearing years.

The Regional Planning Councils noted the chronic underfunding of the mental health system. While legislators inserted language in the budget legislation passed in 1994 to create crisis stabilization units in each of the 14 regions – one for children and one for adults – to date, only 18 of the 28 units have been funded. The funding for mental health has been at a "continuation" level for the past ten years, but without any adjustment for inflation or cost-of-living, resulting in deficit funding. In addition, the Regional Planning Councils were unanimous in describing the difficulties in the ways in which funding was allocated to the regions. Rigid categorization of funding streams makes it all but impossible for there to be discretion and priority-setting at the local level. Funding for mental health and substance abuse services has not been a priority in Kentucky, despite the universal acknowledgement of the old adage: "You can pay me now…or you can pay me much, much more later!"

**Common Issues:** A number of "common issues" were consistently identified in the Regional Planning Council reports as needing to be addressed across all regions of the state:

a. Collaboration
b. Planning
c. Fiscal Policy
d. Public Policy
e. Public Education
f. Professional Staffing
g. Transportation/Access

The Commission authorized five work groups made up of stakeholders around the state to analyze the Regional Planning Council reports from these perspectives:

a. Children
b. Adults
c. Aging
d. Criminal Justice
e. Quality Assurance/Consumer Satisfaction

The Commission received the reports from the work groups in May 2001 and identified several other issues which were common in theme across regions and which were added to the template for recommendations:

a Housing and Housing Supports
b. Supported Employment
c. Gaps in the Continuum of Services

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The Commission also heard testimony from consumers and family members about their most pressing needs; from Judges operating Drug Courts and Mental Health Courts about their effectiveness; from National Council of State Legislatures (NCSL); from the Texas Mental Health Boards about fiscal policy and funding and from the KY Transportation Cabinet and transportation vendors about problems in the system.

The Commission voted to approve its recommendations and prepared its final report, due on June 21, 2001. The report was distributed to the Governor, elected officials, Commission and Regional Planning Council members, and to other interested parties.

The Commission met again on July 23, 2001 to review its recommendations and to set priorities, with input from the Regional Planning Councils. Priorities recommendations were articulated in two broad categories: those that have a fiscal impact and those which can be implemented without funding increases.

**PRIORITY RECOMMENDATIONS WHICH REQUIRE NEW OR INCREASED FUNDING:**

A. Priorities which are included in **moving Kentucky** from its current national ranking of **44th in per capita spending** on Mental Health/Substance Abuse (MH/SA) services to the upper half of states – a ranking of **25th nationally**. This would be accomplished over the next ten years with increased funding for MH/SA services through the Department of MH/MR Services.

The following recommendations are specific to the 2002-04 biennial budget:

- Complete the **Regional Crisis Stabilization Service Array** so that each of the 14 Mental Health/Mental Retardation regions has the services necessary to respond to a child or an adult with a mental health or substance abuse emergency situation. Ten of the 28 units authorized in the 1994 Budget Bill have never been funded.
- Increase **available transportation** for all persons who need to access MH/SA services by developing collaborations with other agencies, creating mobile services where appropriate, and paying for public transportation or alternative means.
- Establish an array of **suitable housing options and housing supports** for consumers with mental illness, substance abuse and dual diagnoses through collaborative efforts and increased funding.
- Support **Regional Flexible Safety Net Funding** to assure services for those who do not have any payor source and to assure a seamless continuum of care in each region of the state.
- This Flexible Safety Net Funding may be used in each region to:

  a. Assure the **availability of trained mental health and substance abuse professionals** in all regions of the state through increased educational programs and financial investment in improved salaries and benefits.
  b. Expand the availability and increase the utilization of **telehealth and distance learning technology** to reduce the isolation in the rural areas, to integrate the community provider network and to implement training programs.
  c. Assure **availability and appropriate use of all effective medications;** increase funding for the community medication program; assess pilot programs for the use of evidence-based procedures for clinical decision-making in prescribing medications, evaluating outcomes as to quality of life, clinical effectiveness, cost savings and cost offset; increase greater access to prescribing professionals and education of consumers and family members about new medications.
  d. Reduce repeated institutionalizations by increasing **proactive case management and wrap-around services**, by educating consumers and families to reduce the risk; by utilizing consumer and family operated services; and by increasing collaboration with institutions for more proactive discharge planning.

- Collaborate with community partners to identify education opportunities and to promote anti-stigma activities through a coordinated **statewide public education campaign** designed to increase the likelihood that individuals will recognize and seek treatment for their mental illness or substance abuse disorder. Additionally, institute **training across systems** to increase identification of mental health and substance abuse issues and appropriate referral of individuals for treatment.
- **Increase treatment services for individuals with Substance Abuse Disorders or Dual Diagnoses:**

  a. Assure availability of appropriately trained professionals to deliver assessment and treatment services.
  b. Address barriers to access for suitable housing for persons with substance abuse disorders or dual diagnoses, particularly with the establishment of sober housing options for consumers in recovery.
  c. Expand drug courts across the state.
  d. Assure access to all appropriate medications, including those which treat craving for substances.
  e. Increase the availability of medical and non-medical detoxification services (including social model detox) for consumers with substance abuse problems.
  f. Increase the availability of case management and wrap-around services for individuals with substance abuse disorders or dual diagnoses.
  g. Develop an accessible continuum of care for children and youth with substance abuse diagnoses, including therapeutic foster care and residential treatment facilities.

B. Priority recommendations which require additional dol-

lars, but the funding would not come directly from the Department of Mental Health/Mental Retardation Services and would not count toward improving Kentucky's national ranking in per capita spending on MH/SA services:

- **Expand Medicaid coverage of Primary and Secondary Substance Abuse Diagnoses** to Medicaid-eligible populations of all ages.
- Collaborate with the Cabinet for Workforce Development to implement the **Supported Employment Funding Initiative** developed by the Cabinet, the Department of Vocational Rehabilitation, consumers, families, advocates and service providers.
- Institute a **Medicaid Buy-In Program** with the Ticket to Work initiative and provide access to Medicaid Buy-In for those Medicaid-eligible consumers who are employed or who are planning to work.
- Expand the collaboration of the Departments of Mental Health/Mental Retardation Services and the Department of Corrections with the Justice Cabinet, Administrative Office of the Courts and the Criminal Justice Council for funding to implement **Criminal Justice/Behavioral Health initiatives,** particularly the Drug Courts and the cross-systems education and training.
- Criminal Justice/Behavioral Health initiatives include:
  a. Cross-Systems training of all stakeholders involved with the interface of the criminal justice/behavioral health systems at the state, regional and local levels.
  b. Maintaining and expanding Drug Courts across the state for youth and adults.
  c. Implementing two pilot Mental Health Courts – one rural and one urban.
  d. Funding specialized intensive case managers, wrap-around dollars and community resource coordinators to identify and secure services necessary for youth and adults at the Criminal Justice/Behavioral Health interface.
  e. Providing an array of housing options for diversion and reintegration of this population.
  f. In conjunction with the Jailers' Association, local jailers and the Department of Corrections, developing regional behavioral health jails to offer specialized treatment services to inmates with MH/SA diagnoses.

**PRIORITY RECOMMENDATIONS WHICH DO NOT REQUIRE NEW OR INCREASED FUNDING:**

**The goal is to establish a new policy direction** for Kentucky to be a national leader in community-based care for persons with MH/SA problems based on best practices, regional planning and coordination of services.

**Continue the collaborative process created by HB 843** as the first step toward creating an integrated community-based system of care. Remove the sunset provision on the HB 843 Commission and Regional Planning Councils, recognizing that planning and improving MH/SA services for Kentucky's citizens will be a long-term process.

**Affirm the Regional Planning Councils** by defining their continuing role in reviewing progress toward goals, conducting needs assessments and making recommendations to the Regional MH/MR Boards. Encourage participation on the Regional Planning Councils to reflect consumers, caregivers, family members and professionals from all age groups.

**Add to the Statewide Commission:** Consumer, Family Member, Regional Planning Council Chair, other Cabinets and Departments, Criminal Justice Council and KY-ASAP; assure coordination with other planning and oversight entities.

**Review existing statutes and regulations** in light of the Commission's recommendations, repealing or revising where needed, and enacting legislation to implement recommended policies.

**Increase housing options for older persons with mental illness, substance abuse or dual diagnoses** who are at risk for premature institutional/facility placement or are able to leave institutional care to live in the community, if appropriate housing and housing supports are available.

**Assess the adequacy and availability** of the current mental health and substance abuse **professional workforce** in each region.

**Set a two-year work plan** for the Regional Planning Councils and Statewide Commission: Articulate behavioral goals to be accomplished in the statewide plan; put these issues on future agenda for the Regional Planning Councils and the Statewide Commission, utilizing the regional information, needs assessments and recommendations. Future items include:

> MH/SA Services for aging population; Children's MH/SA services in schools; Reviewing KRS 202A and KRS 504, receiving regional input as to local problems with these statutes, convening a broad-based statewide work group to make recommendations to the Commission; Mental Health Courts; Availability of most effective medications; Outcome measures and consumer satisfaction; Access to substance abuse treatment for veterans and for physicians and other professionals who are impaired because of addictions.

Require all providers who receive public funds to have formalized **quality assurance/quality improvement processes,** including a grievance procedure.

Increase access to **community-based hospitalization**, rather than depending only on state institutions.

Identify the specific **barriers in each region** which prevent the elderly from accessing mental health and substance abuse treatment services.

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Collaborate with universities and the Council on Post Secondary Education to identify needs and to develop strategies for **educating and training professional staff,** including pilot cross-systems education programs.

**Advocate with insurers** for appropriate and comprehensive Mental Health and Substance Abuse benefits for all ages, expanding the parity law's application, if necessary.

The Kentucky Criminal Justice Council met on September 11, 2001 to review the HB 843 Statewide Commission's recommendations concerning the Criminal Justice/Behavioral Health Interface. Nearly all of the HB 843 recommendations were endorsed by the Council and several additional recommendations were made.

The HB 843 Statewide Commission held a Press Conference on October 10, 2001 in the Capitol Rotunda. At that time, the Commission announced its recommendations and priorities and received a report from the KY Criminal Justice Council. Reports on continuing Regional Planning Council activities were also received at that time. The Press Conference provided an opportunity to educate the public on the widespread needs which must be addressed if individuals with mental illness, substance abuse or dual diagnoses are to be effectively supported and served in communities across Kentucky.

Next issue…The Criminal Justice Issues

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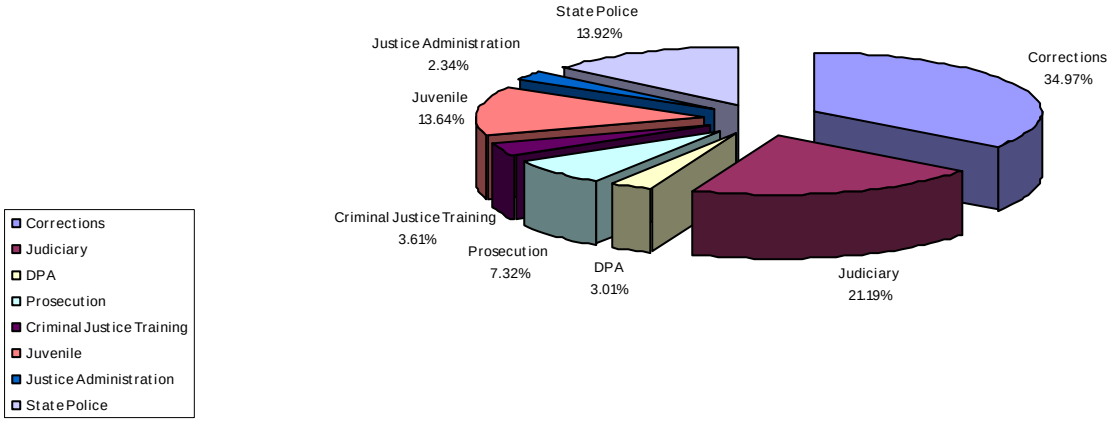
**Sheila A. Schuster, Ph.D.** is a licensed clinical psychologist who received her graduate degrees at Purdue University and the University of Louisville. For over twenty years, she was a child clinical psychologist in private practice in Louisville. Dr. Schuster is no longer in clinical practice, as she devotes her full-time work to advocacy on mental health and health care issues. Dr. Schuster is currently the Director of Professional Affairs for the Kentucky Psychological Association. She also serves as the Executive Director of the Kentucky Mental Health Coalition comprised of 66 organizations representing consumers, family members, advocates, service agencies and providers. In the area of Health Care Reform, Dr. Schuster is a founding member and Co-Chair of the Kentuckians for Health Care Reform, a grassroots advocacy coalition of over 200 organizations. ■

**Sheila A. Schuster, Ph.D.**
**120 Sears Avenue, Suite 212**
**Louisville, KY 40207**
**Tel: (502) 894-0222; Fax: (502) 894-0635**
**drsasod@aol.com**

For the Fiscal Year 2002 (July 1, 2001 - June 30, 2002), criminal justice expenditures in Kentucky are $956 million, which is 5.67% of monies spent by the Commonwealth. This is up from FY 2000 when there was $830 million or 5.43%. Final Budget Memorandum (www.Lrc.state.ky.us/home/agency.); (http://162.114.4.13/budget/final/vol.1 pg.26) Appropriations for all of state government in FY02 is sixteen and three-quarter billion dollars. The FY02 criminal justice appropriations prior to any budget reductions of $955,980,800 were divided as follows:

| | | |
|---|---|---|
| Corrections | 334,321,900 | 34.97% |
| Judiciary | 202,532,500 | 21.19% |
| State Police | 133,052,600 | 13.92% |
| Juvenile | 130,430,000 | 13.64% |
| Prosecution | 69,972,900 | 7.32% |
| Criminal Justice Training | 34,552,500 | 3.61% |
| DPA | 28,747,500 | 3.01% |
| Justice Administration | 22,370,900 | 2.34% |
| Total | 955,980,800 | 100% |

A graph indicating these percentages of expenditure for each Kentucky criminal justice program is:



# DNA: UPCOMING LEGISLATIVE ACTION

The Joint Judiciary Committee heard testimony on DNA at its October 2001 meeting. Public Advocate Ernie Lewis testified as follows:

15 years ago, Jeffrey Pierce was tried and convicted of a rape in Oklahoma. He was convicted on the false testimony of Ms. Gilcrist, an Oklahoma City police laboratory scientist. DNA later revealed that another sex offender who was then serving time in an Oklahoma prison was the real rapist. Jeffrey Pierce is now a free man

18 years ago, Charles Fain was put on Idaho's death row for the rape and murder of a 9 year old. An FBI expert had testified that a hair of Fain's matched hairs found on the child's body. This year, Fain's DNA was compared to the hairs found on the body and it was found that they did not belong to him. Mr. Fain was freed this past month after 18 years on death row.

22 years ago, Jerry Frank Townsend, was sentenced to 7 life sentences for 6 murders and a rape. He confessed and he pled guilty. DNA has now cleared him of 2 of the murders he confessed to committing. His IQ is between 50 and 60. He has now been freed.

These cases demonstrate some of the ways in which DNA is revolutionizing law enforcement and criminal justice.

### DNA is Important

DNA is important to ensure guilty people are prosecuted and punished. DNA is also vital to ensure that the innocent are not punished for crimes they did not commit. DNA is an including and excluding technology.

The FBI has found that since 1979, DNA testing has cleared 25% of sexual assault suspects whose samples were sent to the FBI

John Silbar reported in the July 2001 *Boston Herald* that 87 prisoners have been exonerated through DNA testing. These 87 included William Gregory, a Louisville man wrongly convicted of rape, and freed after DNA testing after serving 8 years in prison.

The Kentucky Criminal Justice Counsel Interim Report (July 2001) recommended legislation to adequately fund and support the collection, testing and preservation of DNA to ensure its availability to prosecution and defense in a timely manner in capital cases. It is further recommended that legislation comply with federal guidelines for incentive funding.

There is broadly based public support for making DNA testing available to inmates. The 2000 Gallup Poll shows 92% of Americans support DNA testing for inmates convicted prior to availability of the test. The 2001 Peter D. Hart Associates Poll showed 91% favor requiring courts to give death row inmates the opportunity to prove their innocence with DNA tests.

After a year of study, a distinguished bipartisan blue ribbon committee of The Constitution Project recently issued a report on reforming capital punishment, including 18 reforms. The Constitution Project's 30-member death penalty initiative group has members that are supporters and opponents of the death penalty, Republicans and Democrats, conservatives and liberals. Entitled *Mandatory Justice: Eighteen Reforms to the Death Penalty* (2001) http://www.constitutionproject.org/dpi/Mandatory_Justice_7-05-01.PDF, the Report made the following recommendation for DNA:

> Reform #6: "DNA evidence should be preserved and it should be tested and introduced in cases where it may help to establish that an execution would be unjust.
>
> All jurisdictions that impose capital punishment should ensure adequate mechanisms for introducing newly discovered evidence that would more likely than not produce a different outcome at trial or that would undermine confidence that the sentence is reliable, even though the defense would otherwise be prevented from introducing the evidence because of procedural barriers.

Co-Chairs of this 30-member group were: Charles F. Baird *former Judge, Texas Court of Criminal Appeals,* Gerald Kogan, *former Chief Justice, Supreme Court of the State of Florida; former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida*, Beth A. Wilkinson**,** *Prosecutor, Oklahoma City bombing case.* William Sessions FBI Director in the Reagan and Bush administrations was a member.

### DPA's Interests

The Department of Public Advocacy has an interest in DNA Legislation. DPA attorneys represent everyone on Kentucky's death row and 90% of felons at trial level. DPA has a Post-Conviction branch charged with the representation of post-conviction inmates. The DPA Kentucky Innocence Project at UK, Chase, UK School of Social Work has reviewed 141 cases. Of these, 32 involve evidence that could be subject to DNA testing of evidence.

### Areas of Concern

1. DNA testing should be available to persons who make a showing to a court that: A reasonable probability exists

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that the inmate would not have been prosecuted or convicted if the exculpatory evidence had been obtained through DNA testing. If the evidence would be relevant to the correctness of the sentence, or if it would be helpful to establishing an erroneous conviction, testing should be available. Evidence to be tested is still in existence. Evidence was not previously tested, or if it was, new testing is now available. State should provide counsel for persons who make this showing.

2. Biological material needs to be saved while the person is incarcerated. If the Commonwealth seeks to destroy the crime scene biological evidence, it should only be accomplished after notice and an opportunity to petition the court for testing. This is consistent with the National Commission on the Future of DNA Evidence and the proposed Innocence Protection Act now pending in Congress.
3. DNA/Biological evidence needs to be kept despite a confession or a plea of guilty because we have persons with mental retardation who confess to crimes they did not commit.
4. Biological evidence itself rather than results should be stored to accommodate new technology.
5. Procedural limitations should be relaxed where the results show an innocent man is in prison. Presently, there is a 3 year standard under RCr 11.42 and a 1 year under RCr 10.06 or more "if the court for good cause permits." This should be relaxed to allow for the release of an innocent man at any time the evidence is produced. This approach is supported by the National Commission on The Future of DNA Evidence, a federal panel established by law enforcement, judicial, and scientific experts.
6. Kentucky needs to be ready. Federal Byrne Grant funds, Local Law Enforcement Assistance Program funds, DNA Analysis Backlog Elimination Grants, Paul Coverdell National Forensic Sciences Improvement Grants, DNA Identification Grants, Drug Control and System Improvement Grants, Public Safety and Community Policing Grants will be available under the Innocence Project Act of 2001(H.R. 912/S. 486). That bill has 214 co-sponsors in the House and 25 in the Senate. The bill text is at: http://capwiz.com/jp/webreturn/?url=http://thomas.loc.gov/cgi-bin/query/z?c107:H.R.912:

   The national legislation conditions receipt of funding on adequate procedures for preserving biological materials, and testing must be available to inmates. DNA testing must be made available to death row inmates if the testing has the scientific potential to produce new exculpatory evidence to a claim of innocence. The National Institute of Justice has a Uniform Statute for obtaining post-conviction testing. See NIJ's Postconviction DNA Testing: Recommendations for Handling Requests (September 1999) found at:
   http://navigation.helper.realnames.com/framer/1/112default.asp?realname=National+Institute+of+Jusice&url=http%3A%2F%2Fwww%2Eojp%2Eusdoj%2Egov%2Fnij&frameid=1&providerid=112&uid=30117130 ■

# Juvenile Judgment and the Death Penalty

***The process of balancing emotions, reason and life experience in making choices — the process we call judgment— is still maturing in late adolescence.***

As a society we withhold responsibilities until youth reach a certain age:

16— to get a learner's permit to drive
18— to enter contracts, vote, get a tattoo, and sign for medical treatment or a school trip
21— to consume liquor, or to get a license back if you drank while driving under 21.

Insurers justify higher rates for drivers under 25; car rental companies may not rent to those under 25. We recognize the limitations of youth in almost all our laws and customs yet suspend this wisdom when a youth commits a serious offense. If we extended that wisdom to our Juvenile statutes we would argue for a degree of diminished responsibility for youthful offenders. We would argue that there are ample serious punishments short of execution for serious juvenile crime. We would move to eliminate the death penalty for those under 18 years of age because they are still significantly less mature than adults. In fact, if we drew on recent developmental data alone, we would probably want to draw the line at 21.

If we took the position that those under 18 have diminished judgment our wisdom would be strongly supported by research on child development. A commission of the National Academy of Science[1] reviewed the scientific evidence and reported, "adolescents are not just little adults. Physical, emotional, and cognitive development continue throughout adolescence." We know the brain is still developing through the late teens and even into the early 20's.[2] The prefrontal cortex, the area adults use to exercise emotional control, undergoes significant change in late adolescence. Bran imaging shows this area is very active in adults making certain social judgments, but barely involved in similar teen judgments.

We know that judgment is still maturing after the teen years. A recent study by distinguished researchers in adolescence[3]

compared a number of traits related to judgment and the likelihood of making anti-social decisions among five non-delinquent groups in the 8th, 10th, and 12th grades, young adults (under 21), and older adults (average age 25). They found significant differences in maturity of judgment and anti-social choices between each age level. This was particularly true for males. Females in the under 21 group reached a level of judgment that males only reached in the 25 year old group.

Grisso and Schwartz[4] recently published an excellent volume in which researchers discuss why normal youth lack the judgment of adults and cite studies showing that, due to distortions of perspective, the judgment of most delinquent youth is even more faulty. Dorothy Lewis[5] of the Yale Child Study Center; who has evaluated more adolescents charged with murder than any psychiatrist in the country, reports that the functioning of most youth charged with murder is compromised by multiple factors including: poverty, a history of brutalization, brain dysfunction, mental disorder or a disturbed family.

On the basis of developmental evidence, the American Psychological Association is opposed to the death penalty for juveniles. The Kentucky Psychological Association has taken the same position. The research and reports cited here add to the accumulating evidence supporting a conclusion of diminished capacity which argues against executing Kentucky juveniles.

**References**


1. Commission of Behavioral and Social Sciences and Education (2001). *Juvenile Crime Juvenile Justice.* Washington, DC: National Academy Press.
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3. Cauffman, E., & Steinberg, L (2000). (Im)maturity of judgment in adolescence: Why adolescents may be less culpable than adults. *Behavioral Science and the Law, 18,* 741-760.
4. Grisso, T. & Schwartz, R. G. (2000). *Youth on trial: A developmental perspective on juvenile justice.* Chicago: University of Chicago Press.
5. Lewis, D. O. (2000). Ethical implications of what we know about violence. In D. O. Lewis & C. A. Yeager (Eds.) *Child and Adolescent Clinics of North America: Juvenile Violence, 9,(4).* Philadelphia: W. B. Saunders. ■



**T. Kerby Neill**
**Child Psychologist**
**3767 Winchester Road**
**Lexington, KY 40509**
**859-231-8830**
**tkneill@email.msn.com**


# Kentuckians Views on Juvenile Death Penalty

**Kentuckians do not support death for juveniles.** An overwhelming number of Kentuckians believe that juveniles should not be executed. Recently, 79.5% of those polled in the state who gave an answer said that the most appropriate punishment for a juvenile convicted of an aggravated murder in Kentucky was a sentence other than death. There are 15.5% of Kentuckians who believe that death is the most appropriate penalty for a juvenile who is convicted of an aggravated murder. There were 4.9% who responded they didn't know. *The Spring 2000 Kentucky Survey* which surveyed 1,070 noninstitutionalized Kentuckians 18 years of age or older from May 18 – June 26, 2000 and was conducted by the University of Kentucky Survey Research Center, asked the following question and had the following answers:

If a 16 or 17 year-old is convicted of aggravated murder, which of the following punishments do you personally think is MOST appropriate:

The death penalty ..... 15.5

Life in prison without the possibility of parole forever ..... 23.1

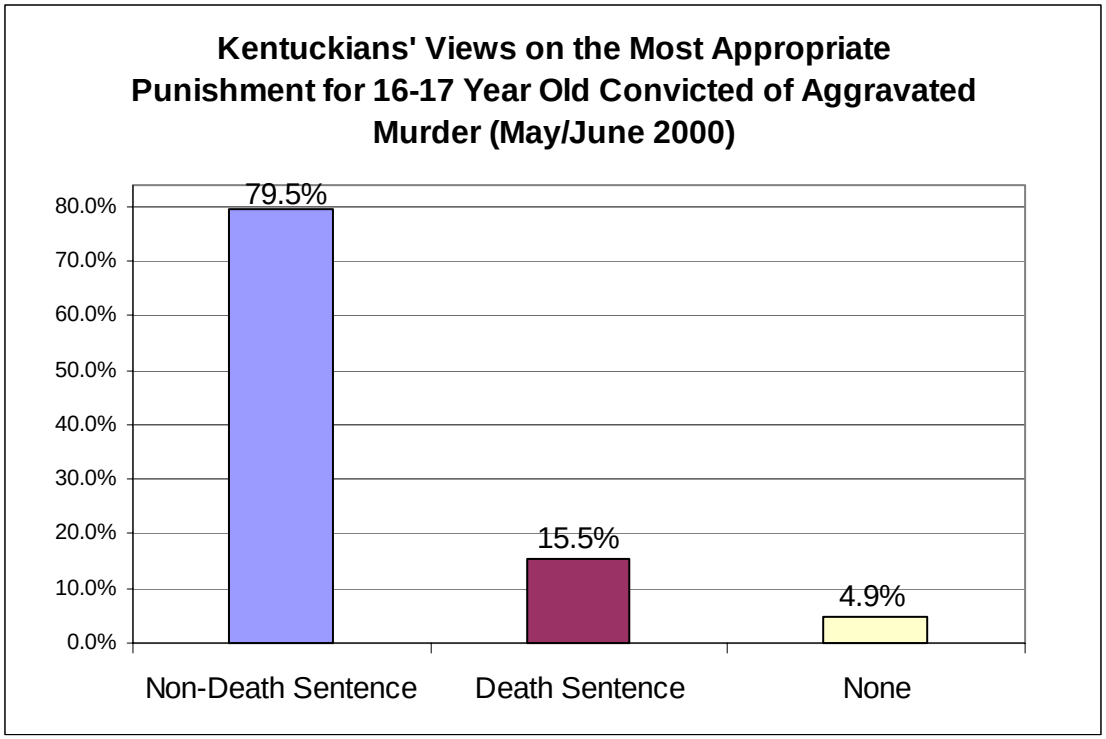
Life in prison without the possibility of parole for 25 years ..... 17.8

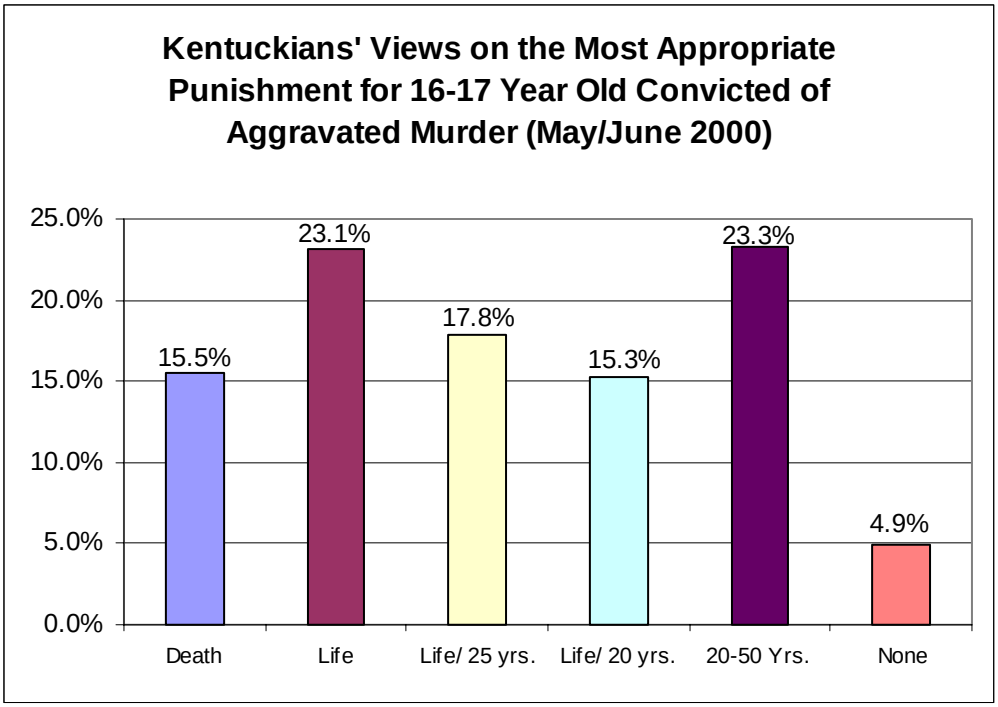
Life in prison without the possibility of parole for 20 years, or ..... 15.3

20 to 50 years in prison without the possibility of parole until at least 85% of the sentence is served ..... 2 3 .3

None of the above (volunteered) ..... 4.9

The margin of error of the poll is approximately ± 3% at the 95 % confidence level. Households were selected using random-digit dialing, a procedure giving every residential telephone line in Kentucky an equal probability of being called. ■


Kentuckians' Views on the Most Appropriate Punishment for 16-17 Year Old Convicted of Aggravated Murder (May/June 2000)
80.0%
70.0%
60.0%
50.0%
40.0%
30.0%
20.0%
10.0%
0.0%
79.5%
15.5%
4.9%
Non-Death Sentence
Death Sentence
None


Kentuckians' Views on the Most Appropriate Punishment for 16-17 Year Old Convicted of Aggravated Murder (May/June 2000)
25.0%
20.0%
15.0%
10.0%
5.0%
0.0%
15.5%
23.1%
17.8%
15.3%
23.3%
4.9%
Death
Life
Life/ 25 yrs.
Life/ 20 yrs.
20-50 Yrs.
None

# 2002 Fall Law School Recruitment Schedule

With the beginning of the Fall Recruitment Season the Kentucky Department of Public Advocacy has received many invitations to interview 2nd and 3rd year law students that are primarily drawn to Public Interest Employment. These students will be among those that will be invited to attend DPA's (2nd) Annual Interview Fair scheduled for February 7 & 8, 2002.

Sunbelt Minority Fair, Dallas September 7
Indiana University, Bloomington September 17
Eastern University, Minority Fair September 26
University of Cincinnati September 28
University of Louisville October 1
Northern Kentucky University October 9
University of Kentucky October 11 & 12
Appalachian School of Law October 15
Southern Illinois University October 22
NAPIL Career Fair, Washington, D.C, October 26 & 27

*Gill Pilati*

**Gill Pilati**
**Department of Public Advocacy**
**100 Fair Oaks Lane, Suite 302**
**Frankfort, Kentucky 40601**
**Tel: 502-564-8006; Fax: 502-564-7890**
**Email:gpilati@mail.pa.state.ky.us**

# Arrest Warrant Specificity: An Unused Fourth Amendment Sword

Weapons left unused and ill kept in damp storerooms will not forever keep their keen edge and flexible strength. In Kentucky, the ongoing practice of the issuance of arrest warrants based on improper criminal complaints is slowly corroding a fine blade crafted for the protection of our rights against unreasonable searches and seizures under Section 10 of the Constitution of the Commonwealth of Kentucky, and the 4th Amendment to the United States Constitution.

**Complaints about "The Complaint"**

Perhaps we have all encountered a situation like the following. Upon opening the court jacket in district court, you note that the criminal complaint states:

> On August 14, 2001, in McCreary County, Kentucky, Oliver W. Holmes, having no right to do so and no reasonable ground to believe he had a right to do so, intentionally damaged or destroyed the property of the affiant by cutting the tires of his truck, puncturing and denting the walls and door of his mobile home, breaking the window from the same mobile home, pulling the screen from the windows, etc., causing over $1000.00 in damage, in violation of KRS Section 512.020, Criminal Mischief in the First Degree, a Class D felony.

What is wrong with such a complaint? How does it violate the 4th Amendment to the U.S. Constitution and Section 10 of the Kentucky Constitution? What practical steps can we take to eliminate this unlawful practice?

Let's look at what a complaint is, and what a correct one should contain. According to the Kentucky Rules of Criminal Procedure, RCr 2.02, "the complaint is a written statement of the essential facts constituting the offense charged. It shall be made under oath and signed by the complaining party." RCr 2.04 states "(1) If **from an examination of the complaint** it appears to the judge…that there is **probable cause** to believe that an offense has been committed and that the defendant committed it, the judge…shall issue a warrant for the arrest of the defendant" (emphasis added).

The intent of RCr 2.02 and 2.04 is clear (and in conformity with Section 10 of the Kentucky Constitution and the 4th Amendment to the U.S. Constitution). Only if, from an examination of the "four corners" of the complaint, there is probable cause to believe that an offense has been committed and the defendant was the perpetrator, can the judge issue a warrant of arrest. Stated in the obverse, a warrant of arrest cannot issue unless on its face the wording sworn to in the complaint establishes probable cause to believe a crime was

*Continued on page 22*

*Continued from page 21*
committed, and that the defendant was the person who committed that crime.

*Henson v. Commonwealth*, Ky., 347 S.W. 2d 546 (1961) is in complete agreement. That case established that a warrant which merely states the "ultimate fact" (*i.e.*: a statement of the facts, the existence of which would constitute the crime charged), without stating how and when the fact was observed, was an unconstitutional invasion of Section 10 of the Kentucky Constitution. *Id*., 548. As Judge Palmore opined for the Court, "the onus of being specific is little enough price for the suspension of so valuable a right." *Id.*, 548. Indeed, the Court in *Henson* indicated the factual sensibility of such a rule. "The necessity for a simple statement of how and when an allegedly existing fact was observed could be **unreasonable or burdensome only to one who actually does not have enough reliable information to justify the warrant**." *Id.*, 548 (emphasis added).

*Henson* is not distinguishable from the criminal complaint/arrest warrant situation merely because *Henson* deals with a search warrant rather than an arrest warrant. The 4th Amendment and Section 10 both protect equally the person and property of individuals from unreasonable searches and seizures. One's person is no less secure under our constitutions than one's property.

A criminal complaint such as the hypothetical provided above cannot establish probable cause to believe a crime was committed and that the named defendant was the person who committed the crime. In the complaint, there is no sworn statement by the affiant that the defendant was seen by him, or by anyone else, to have committed the damages he lists. There are no facts to show upon what the affiant bases his conclusion that the named defendant is the perpetrator. No circumstantial evidence is narrated tying the defendant to the crime. There is only a sworn statement that certain damage was done to his property, with an allegation or assumption that the defendant was the guilty party.

Assumption and guesswork are not the mixture from which the mortar of probable cause is made. A warrant based on such a complaint is not only violative of, but is a blatant affront to, the 4th Amendment to the United States Constitution and Section 10 of the Constitution of the Commonwealth of Kentucky. As criminal defense attorneys, it is our responsibility and privilege to challenge such illegal practices.

**Practical Application:**
**Or, How to Complain about Bad "Complaints"**

Lack of specificity in criminal complaints is unconstitutional, but how as a practical manner can this be challenged? Certainly the problem is widespread and ancient of habit. A good start would be filing motions to dismiss for lack of probable cause. These could be made orally at arraignment or more formally in writing at a pretrial conference or before a preliminary hearing. On somewhat of a tangent, please note that the Commonwealth should not be permitted to establish the necessary probable cause for issuance of the criminal complaint and arrest warrant by using information provided during the preliminary hearing. The criminal complaint must in its own body contain the essential probable cause for issuance of the arrest warrant. The violation of Section 10 and the 4th Amendment occurs upon issuance of the invalid warrant, and cannot be remedied by establishing probable cause at the preliminary hearing.

Another way to combat this endemic problem might be to use the affiant's incompleteness in the wording of the criminal complaint against the Commonwealth at a preliminary hearing or trial. Simply point out all the new information the affiant has added since swearing out the complaint. One has to wonder, after all, from where the new information has suddenly come. Such an inquiry is relevant to the witness affiant's credibility and accuracy. If at the time he or she swore out the complaint the affiant knew everything to which he or she is now testifying, why did he or she fail to swear to all that in the complaint?

Systemically, we could encourage our county attorneys to begin using criminal complaint forms which provide a space not only for a recounting of the words of the violated statute(as in the hypothetical above), but which have a separate space for the affiant's grounds of belief. AOC form 315.1 includes such a space. A copy of that form follows this article. Those assisting the affiant in filing the complaint would thus be encouraged to fill in the blanks with the very information which is constitutionally required. Increased use of such forms, in concert with diligent opposition to current practices, can only improve the protection of our clients' rights under Section 10 and the 4th Amendment.

That invalid complaints (and their consequent unlawful arrest warrants) are common does not alter their character, or mitigate the damage they inflict upon our freedom. They must be challenged relentlessly and systemically. The time is overdue for we, as criminal defense attorneys, to clean the corrosion from this aged weapon, specificity in criminal complaints, and challenge the sloppy prosecutors and sleeping judicial guardians which are, however inadvertently, threatening the rights of our clients and ourselves.

**Robert E. Stephens, Jr.**
**Assistant Public Advocate**
**314 Cundiff Square**
**Somerset, Kentucky 42501**
**Tel.: (606) 677-4129; Fax: (606) 677-4130**
**E-mail: rstephens@mail.pa.state.ky.us**

| | | |
|---|---|---|
| AOC-315.1 Doc. Code: COM<br>Rev. 6-96<br><br>Commonwealth of Kentucky<br>Court of Justice<br><br>RCr 2.02 | **CRIMINAL COMPLAINT** | Case No. _____<br><br>Court _____<br><br>County_____ |

COMMONWEALTH OF KENTUCKY

vs.

_____

_____

(Name and address of Defendant, If Known)

The affiant,_____says that on the _____day of_____, _____,in_____County, Kentucky, the above named_____,unlawfully_____

_____

_____

_____

_____

Affiant's grounds of belief as to the commission of this offense are:

_____

_____

_____

_____

_____
Signature of Affiant

Sworn to before me this _____day of _____, _____

Name and Address of Affiant

_____ _____

_____ _____
Title

_____ ■

_____

# Helping Courts Make Good Decisions On Release of Clients Awaiting Trial

The law requires pretrial release of the citizen accused except for very limited cases. There's good reason for the law requiring judges to release accused persons before trial. They include the provision of the right to fully effective counsel, and the recognition of the presumption of innocence as an important principal of justice, and not as a mere rule governing the order of proof at trial.

The law requires the Court to make a very individualized assessment of flight risk for each accused person brought before it, and a good written bond motion helps the court make the assessment more accurately. A sample motion which requires adaptation each time it is used is set out below. There's good reasons for the law requiring judges to make this individualized assessments. Our history prior to the adoption of our Bail Reform Acts shows that a merely mechanical bail assessment based on the perceived severity of the offence does nothing to enforce, and much to frustrate, the right to a reasonable bond. A particularized assessment of flight risk has been shown to uphold the objectives of the right to a reasonable bond, and may even provide incentives reducing the risk of flight.

Litigators will want to specify the exact type of bond you are seeking (*e.g.*, $2000/10%, ROR etc). For one thing, simple fairness and courtesy to the Court, as well as the Rules governing motions, alike require that a motion contain a specific request for the relief that the movant is seeking. RCr 8.14. Also, it does little good for ones client if the Court grants a reduction in bond, and the client is still unable to post that bond.

Adversarial bond hearings are available as a way to persuade but should not be sought unless there is a reason for it. If you have one, careful preparation is required. Use your professional judgement in deciding whether to seek a full evidentiary hearing. Your written motion should take into account the judicial and prosecutorial realities in your jurisdiction.

**Rob Sexton**
**Assistant Public Advocate**
**311 W. 2nd Street, Ste 101B**
**Owensboro, KY 42301**
**Tel: (270) 687-7030; Fax: (270) 687-7032**
**E-mail: rsexton@mail.pa.state.ky.us**

DAVIESS CIRCUIT COURT
DIVISION I*
NO. 01-CR-00*

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. **MOTION FOR REDUCTION IN BOND**

_____ DEFENDANT

The Defendant, by counsel, hereby moves the Court to release him on his own recognizance. This relief is requested pursuant to the Eighth and Fourteenth Amendments to the United States Constitution, Sections Two and Sixteen of the Kentucky Constitution, KRS 431.520, and RCr 4.10, et seq. The Defendant demands an evidentiary hearing on this Motion, pursuant to RCr 4.40. As grounds for this relief, the Defendant states as follows:

APPLICABLE LAW

**I. THERE IS A HEAVY PRESUMPTION AT LAW IN FAVOR OF PRETRIAL RELEASE.**

A. Common Law Antecedents.

The jails of medieval and early modern England were disease ridden pest holes as a general rule, and were recognized as such by the Courts. Accordingly, as an alternative to holding accused persons in such places for long periods of time prior to trial, bail in lieu of incarceration developed. Whitebread & Slobogin, *Criminal Procedure* 491 (1993). Bail was originally conceived quite literally as the bailment or delivery of the defendant to sureties of his own choosing. *Id*. at 491. The original practice seems to be that the sureties would themselves be committed to the jailer if they were unable to produce the defendant for trial, and the law in later days provided that the sureties would have to surrender money or property in

default of bond, rather than their own persons. *Id*. at 491. These ancient forms of bail still seem to exist, broadly speaking, in Kentucky law. For instance, KRS 431.520(1) still allows the Court to put the defendant in the custody of a designated person or organization agreeing to supervise him. To similar effect, KRS 431.520(3)(a) permits the Court to allow good sureties to obtain the release of the accused on their promise to be indebted in a sum certain should the defendant fail to appear.

B. Developments in American Law.

Following English legal precedent, American law continued to favor the pretrial release of defendants prior to trial. For instance, the Judiciary Act of 1789 (enacted prior to the Eighth Amendment) states that "upon all arrests in criminal cases, bail shall be admitted, except where the punishment be death." 18 U.S.C.A. § 3142. This recognition that all offenses shall be bailable, analogous to the rather more liberal provision in Section Sixteen of the Kentucky Constitution, was augmented by the language in the Eighth Amendment providing that "excessive bail shall not be required".

C. The Development of Bail Bondsmen.

During the course of the nineteenth and early twentieth centuries, the practice developed of accepting a money deposit as the only form of bail. A class of professional sureties developed known as bail bondsmen. A bondsman would typically post his client's bond in exchange for a set fee, which the client would lose whether he appeared for trial or not. See Whitebread & Slobogin, *supra* at 492.

The numerous problems attendant upon such a system, all of which may be observed in fulsome array in those unhappy states which retain bail bondsmen, may be summarized in two points. First, under the system of bondmen, the amount of bail tended to be set by means of a mechanical process based solely on the nature of the offense. Secondly, and as an inevitable result of the first point, the jails grew full of people awaiting trial.

D. Reform.

Given these problems, many states, following the original lead of New York, moved to abolish the system of bail bondsmen. Kentucky followed suit in 1976. KRS 431.510. To replace our system of bail bondsmen, the General Assembly passed KRS 431.520 establishing a strong preference for release on nonfinancial conditions, and KRS 431.525 establishing an individualized method of analysis for courts to employ in setting bonds. These statutes were extended comity by the Supreme Court, which in 1976 promulgated RCr 4.10 et seq, which broadly track and supplement the statutes just cited.

Some states have augmented their reform statutes by allowing their courts to withhold bail for a certain period (sixty days is typical) following a hearing where it is shown that the defendant would be a danger if released. The statute governing bonds set by federal courts has a similar provision. See 18 U.S.C.A. § 3141-3150 (1984).

It is highly significant, however, and must be firmly borne in mind, that the Kentucky statute <u>does not</u> authorize pretrial detention without bond upon a showing of dangerousness. No such procedure exists in our law. Moreover, even the federal statute mentioned above continues to express a strong preference for individualized pretrial release. It contains, for instance, the following language: "A judicial officer may not impose a financial condition that results in pretrial detention of a person." 18 U.S.C.A. § 3142.

II. KENTUCKY LAW HEAVILY FAVORS PRETRIAL RELEASE.

While it is hoped that this historical background is of assistance to the Court, it is the Kentucky statute, as augmented by our rules, which primarily guides the determination of the issue now at bar. To that statute, the Defendant now requests the Court to turn its attention.

A. The Presumption of Release on Recognizance.

KRS 431.520 establishes a presumption that "any person charged with an offense shall be ordered released ... on his personal recognizance or upon the execution of an unsecured bail bond in an amount set by the Court …". This presumption may be overcome by one factor and one factor only: a determination by the Court "in the exercise of its discretion that such a release will not reasonably assure the appearance of the person as required."

Although the statute speaks in terms of discretion, it does not follow that this determination is to be made upon an arbitrary basis. It is to be made upon a <u>reasonable</u> basis. Kentucky Constitution, § 2. For one thing, the Court is required to give due consideration to the recommendation of the local pretrial services agency. RCr 4.10. In addition, the Court is bound,

*Continued on page 26*

*Continued from page 25*
at the very least, to be able to recite some articulable reason of its own to support its decision. *Abraham v. Commonwealth*, Ky. App., 565 S.W.2d 152 (1977).

B. The Result when the Presumption of Personal Recognizance is Overcome.

When the Court, in the exercise of its reasoned discretion, makes a determination that a recognizance or unsecured bond is insufficient to secure the defendant's appearance, it does not therefore follow that the defendant may not be released, or even that the law expresses any preference for continued detention. To the contrary, whenever the presumption of a recognizance bond is overcome, the Court is directed by the law to release the defendant on the least onerous authorized conditions likely to insure the defendant's appearance. RCr 4.12. See also KRS 431.520. The Court is directed further by the law to select between these authorized conditions solely upon a reasoned assessment of the risk of the Defendant's non-appearance. RCr 4.12.

C. The Amount of a Cash Bond.

One, and only one, and the most onerous of the authorized conditions that may be placed upon a defendant not entitled to release on recognizance is the execution of a full cash bond. KRS 431.520(3)(c), KRS 431.525. As the most onerous of the authorized conditions, the imposition of a full cash bond should be imposed as a last resort on the particular case. RCr 4.12.

The amount of bond set should not be oppressive and should be considerate of the financial ability of the defendant to give bail. It may take into account the reasonably anticipated conduct of the defendant if released, but may be elevated only in proportion to the risk of bad behavior. The amount of the bond should concurrently be reduced in proportion to defendant's poverty and indigency. KRS 431.525(1)(e). The law does not require the Court consistently to set bonds of the same amount for each class of offense. Indeed, such a mechanical calculus is forbidden. RCr 4.16, KRS 431.525. What is required is a highly particularized inquiry into each case, with the law providing step-by-step guidance to the Court in the exercise of its discretion.

OPERATIVE FACTS

The following facts support the Defendant's release on his own recognizance:

**1.** ***(specify).***

WHEREFORE, the Defendant moves as follows:

1. Release on a bond of (***specify)***.
2. An evidentiary hearing on this Motion.
3. A written memorandum of findings and conclusions in the event this Motion is overruled.

_____
Assistant Public Advocate

NOTICE AND CERTIFICATE OF SERVICE

**Please take NOTICE that the foregoing MOTION will be brought on for hearing before the Hon._____, Judge, Daviess Circuit Court, Division _____, on _____, 2001, at 8:30 a.m. or as soon thereafter as counsel may be heard.**

I do hereby certify that I have caused a true and correct copy of the foregoing MOTION AND NOTICE to be served upon the Plaintiff by hand delivering a true and correct copy of same to the Commonwealth Attorney's Office as follows: Daviess County Judicial Center, 100 East Second Street, Third Floor, Owensboro, Kentucky 42303 on this the _____day of _____, 2001.

COMMONWEALTH OF KENTUCKY
DAVIESS CIRCUIT COURT
DIVISION ___
NO. ____-CR-00_____

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. **ORDER GRANTING PRETRIAL RELEASE**

_____ DEFENDANT

On the Motion of the Defendant, the Court has found as follows:

1. The Defendant is a resident of Daviess County, Kentucky. He resides at _____, with his wife and their child.
2. The Defendant is employed at _____.
3. The Defendant has family ties to the community. His parents, long term residents of the community, reside at _____. His two brother and their families reside here. Significantly, the Defendant has no ties elsewhere. All his friends and family are here.
4. The Defendant, a roofer by trade, has worked at his current employer's business for five years. His current employer speaks highly of him.
5. Although the Defendant has been charged on previous occasions in Daviess District Court, he has had no charges elsewhere. The Defendant was charged on one occasion with a failure to appear. However, he was found within this county a short time afterward, and had made no efforts to change his residence or to establish ties to another jurisdiction, or to avoid process in this county.
6. The Pretrial Services Officer recommended, with some caution, that the Defendant be released on his own recognizance or on an unsecured bond.

The Court, therefore, has drawn the following conclusions:

1. The Defendant represents a low risk of flight.
2. Although the Defendant has a record in Daviess District Court and, thus, may be fairly said to pose a moderate risk of acquiring new misdemeanor charges, this risk is insufficient fully to overcome the presumption of release set forth in KRS 431.520.

Accordingly, IT IS HEREBY ORDERED as follows:

1. The Defendant shall be released forthwith upon his own recognizance.
2. The Defendant shall observe the following non-financial conditions of release:
   A. He shall obey the law.
   B. He shall reside at _____ and shall obtain Court approval prior to changing his residence.
   C. He shall continue to work at _____, and shall notify the Court, by counsel, if he changes his employment.
   D. He shall appear before this Court on _____ at the hour of 1:30 p.m. for a pretrial conference.

This the _____ day of _____, 2002.

_____
Judge
Daviess Circuit Court, Division ___

PREPARED BY:

_____
Robert F. Sexton
Assistant Public Advocate
Counsel for Defendant

HAVE SEEN & AGREED:

_____
Commonwealth Attorney ■

# Kentucky Defender Trial Leaders Working to Insure High Quality Representation of 99,000 Clients Each Year

Kentucky's statewide public defender program provides representation through 26 full-time trial field offices. By the end of FY01, these offices provided trial representation in 104 of Kentucky's 120 counties. Offices cover from 1 county (*e.g.* Jefferson, Fayette, and Kenton) up to 8 counties (Columbia).

A directing attorney who is responsible for insuring the high quality representation of the clients in the counties of responsibility leads each of these 26 offices. Trial cases handled in these offices increased by over 3% from FY 00, rising from 95,000 to nearly 99,000 cases. Of the 99,000, 21% (or 21,000) were Circuit Court cases, 79% (or 78,000) were District Court cases. The percentages are identical to FY 00, when there were 20,000 Circuit Court cases (21%) and 75,000 District Court cases (79%). Juvenile cases handled in these trial offices were 16,631, a 3% increase from last year.

For FY01 (July 1, 2000 - June 30, 2001), trial cases range from 22,324 in Louisville, 6,863 in Lexington, 5,550 in Elizabethtown, 4,970 in Paducah to 590 in Murray, 740 in Boyd, 1090 in Paintsville.

Average caseload per attorney for FY01 ranges from 606 in Elizabethtown, 604 in Paducah, and 592 in Henderson to 347 in Richmond, 321 in Stanford, and 283 in Stanton. The average number of cases handled by a trial attorney fell from 429 in FY 00 to 421 in FY 01, a decrease of nearly 2%. This occurred due to the increased number of lawyers funded by the 2000 General Assembly, enabling DPA to lower individual trial attorney caseloads at the same time that overall trial caseload is increasing.

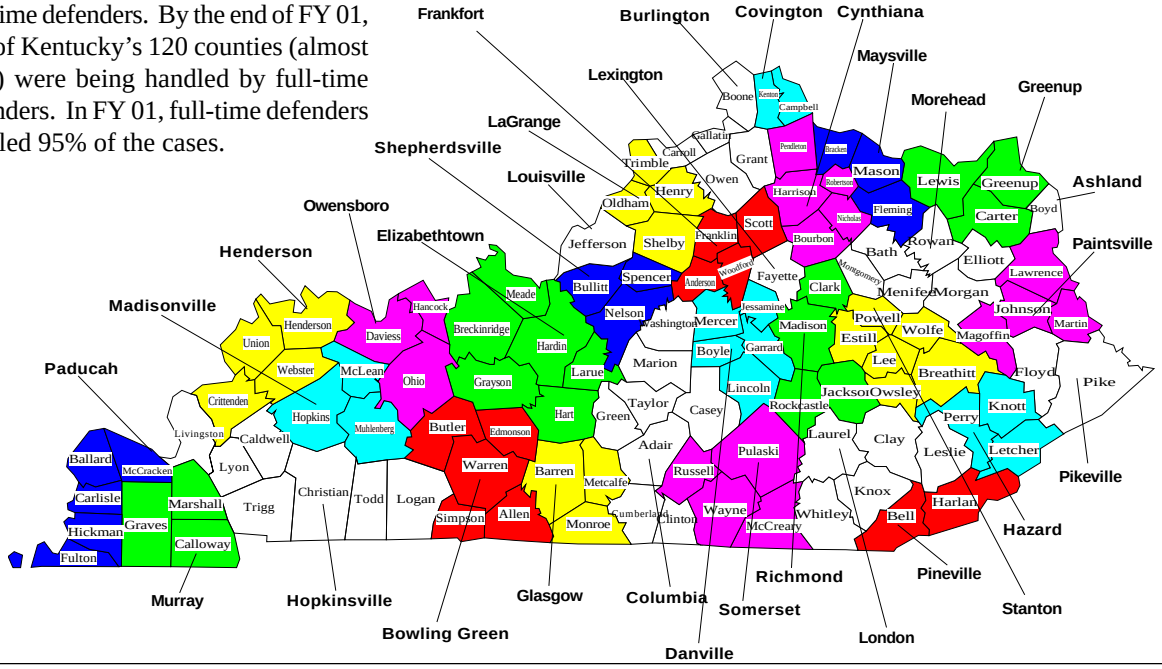
Each Directing Attorney in the 26 trial offices is also responsible for creating a plan of representation for conflict cases in partnership with private attorneys. Of the 99,000 cases, 3,000 were conflicted out to private attorneys.

Each directing attorney in the trial offices is also the local public advocate responsible for working with the local criminal justice system with judges, prosecutors, clerks, probation and parole officers, jailers, pretrial release officers and others to improve the system's responsiveness to defender clients' needs for fair process and reliable results.

Ernie Lewis, Public Advocate, said "I have long been committed to a full-time delivery system. With 104 of our 120 counties being covered by a full-time office by the end of the FY01, we have almost achieved that goal. The heart of the full-time system is the local trial field office, run by an effective directing attorney who is a co-manager of the local criminal justice system, a staff of well-educated attorneys committed to providing professional and excellent client representation, and a committed support staff providing other necessary services to the attorneys, clients, and courts."

Under Public Advocate Ernie Lewis, defenders are working to increase their leadership skills and capacities. Each quarter, DPA provides a half-day of leadership education for its defender leaders. Defenders are working on understanding the perspectives of others, creating a more professional and excellent workplace and active supervision of staff. DPA also recently conducted a 2 and a half-day leadership institute in cooperation with Minnesota defenders.

In 1996, DPA covered 47 counties with full-time defenders. By the end of FY 01, 104 of Kentucky's 120 counties (almost 87%) were being handled by full-time defenders. In FY 01, full-time defenders handled 95% of the cases.



**Our Local Defender Leaders, Location, and Fiscal Year 2001 Total Office Cases:**

**Ashland (Trial)**
P.O. Box 171
Catlettsburg, KY 41129
T: (606) 739-4161; F: 739-8388
E-mail: bhewlett@mail.pa.state.ky.us
Cases: 740

**Bowling Green (Trial)**
1001 Center Street, Suite 301
Bowling Green, KY 42101-2192
T: (270) 846-2731; F: 846-2741
E-mail: rhoward@mail.pa.state.ky.us
Cases: 3,843

**Columbia (Trial)**
111 Jamestown Street/P.O. Box 9
Columbia, KY 42728
T: (270) 384-1297; F: 384-1478
E-mail: sbloyd@mail.pa.state.ky.us
Cases: 2,879

**Covington (Trial)**
333 Scott St., Suite 400
Covington, KY 41011
T: (859) 292-6596; F: 292-6590
E-mail: tbryant@mail.pa.state.ky.us
Cases: 2,995

**Eddyville (P/C)**
625 Trade Avenue/P.O. Box 555
Eddyville, KY 42038
T: (270) 388-9755; F: 388-0318
E-mail: pbaker@mail.pa.state.ky.us

**Elizabethtown (Trial)**
P.O. Box 628
Elizabethtown, KY 42702
T: (270) 766-5160; F: 766-5162
E-mail: abrimm@mail.pa.state.ky.us
Cases: 5,550

**Frankfort (Trial)**
223 St. Clair Street
Frankfort, KY 40601
T: (502) 564-7204; F: 564-1527
E-mail: rbarnes@mail.pa.state.ky.us
Cases: 2,441

**Hazard (Trial)**
205 Lovern Street
Hazard KY 41701
T: (606) 439-4509; F: 439-4500
E-mail: welam@mail.pa.state.ky.us
Cases: 3,576

**Henderson (Trial)**
739 South Main Street/Box 695
Henderson, KY 42419-0695
T: (270) 826-1852; F: 826-3025
E-mail pmartin@mail.pa.state.ky.us
Cases: 2,399

**Hopkinsville (Trial)**
1100 S. Main Street
2nd Floor, Suite 22
Hopkinsville, KY 42240
T: (270) 889-6527; F: 889-6020
E-mail: cwade@mail.pa.state.ky.us
Cases: 4,434

**LaGrange (Trial)**
300 N. First Street
LaGrange, KY 40031
T: (502) 222-7712; F: 222-5985
E-mail: tmeadows@mail.pa.state.ky.us
Cases: 1,288

**LaGrange (P/C)**
Kentucky State Reformatory
LaGrange, KY 40032
T: (502) 222-9441 X 4038; F: 222-3177
E-mail: vstewart@mail.pa.state.ky.us

**Lexington (Trial/Appeal)**
Fayette County Legal Aid, Inc.
111 Church Street
Lexington, KY 40507
T: (859) 253-0593; F: 259-9805
E-mail: cwitt@mail.pa.state.ky.us
Cases: 6,863

**London (Trial)**
911 N. Main St., Box 277
London, KY 40741
T: (606) 878-8042; F: 864-9526
E-mail: jmiller@mail.pa.state.ky.us
Cases: 3,549

**Louisville (Trial/Appeal)**
Jefferson District Public Defender Office
200 Civic Plaza/719 W. Jefferson Street
Louisville, KY 40202
T: (502) 574-3800; F: 574-4052
E-mail: dgoyette@mail.pa.state.ky.us
Cases: 22,324

**Madisonville (Trial)**
1050 Thornberry Drive
Madisonville, KY 42431
T: (270) 824-7001; F: 824-7003
E-mail: areid@mail.pa.state.ky.us
Cases: 2,044

**Maysville (Trial)**
116 W. 3rd Street
Maysville, KY 41056
T: (606) 564-5768; F: 564-4102
E-mail: shorner@mail.pa.state.ky.us
Cases: 1,836

**Morehead (Trial)**
P.O. Box 1038, Route 32 South
Morehead, KY 40351
T: (606) 784-6418; F: 784-4778
E-mail: bthompson@mail.pa.state.ky.us
Cases: 4,251

**Murray (Trial)**
907 Woldrop Drive, MSU
Murray, KY 42071
T: (270) 753-4633; F: 753-9913
Cases: 590

**Owensboro (Trial)**
311 West Second Street, Suite 101B
Owensboro, KY 42301
T: (270) 687-7030; F: 687-7032
E-mail: clyons@mail.pa.state.ky.us
Cases: 3431

**Paducah (Trial)**
400 Park Avenue, Suite B
Paducah, KY 42001
T: (270) 575-7285; F: 575-7055
E-mail: schampion@mail.pa.state.ky.us
Cases: 4,970

**Paintsville (Trial)**
236 College Street/P.O. Box 1423
Paintsville, KY 41240
T: (606) 788-0026; F: 788-0361
E-mail: bking@mail.pa.state.ky.us
Cases: 1,091

**Pikeville (Trial)**
282 S. Mayo Trail, Suite 1
Pikeville, KY 41501
T: (606) 433-7576; F: 433-7577
E-mail: drobinson@mail.pa.state.ky.us
Cases: 2,411

**Pineville (Trial)**
204 Pike Street/P.O. Box 689
Pineville, KY 40977
T: (606) 337-8357; F: 337-1257
E-mail: sbrewer@mail.pa.state.ky.us
Cases: 1,809

**Richmond (Trial)**
116 North 2nd Street/P.O. Box 766
Richmond, KY 40476-0766
T: (859) 623-8413; F: 623-9463
E-mail: kreynolds@mail.pa.state.ky.us
Cases: 2,687

**Somerset (Trial)**
314 Cundiff Square
Somerset, KY 42501
T: (606) 677-4129; F: 677-4130
E-mail: kbishop@mail.pa.state.ky.us
Cases: 2,079

**Stanford (Trial)**
203 W. Main St./P.O. Box 154
Stanford, KY 40484
T: (606) 365-8060; F: 365-7020
E-mail: carmentrout@mail.pa.state.ky.us
Cases: 1,746

**Stanton (Trial)**
108 Marshall Street/P.O. Box 725
Stanton, KY 40380-0725
T: (606) 663-2844; F: (606) 663-5333
E-mail: rcreech@mail.pa.state.ky.us
Cases: 1,556 ■

# KENTUCKY CRIMINAL JUSTICE COUNCIL SUMMARY OF 2001 RECOMMENDATIONS

## Executive Committee:

(1) The Executive Committee recommends that the membership of the Criminal Justice Council, as set forth in KRS 15A.040, be amended to include representation from the Kentucky Parole Board.

(2) The Executive Committee recommends increased and improved public education about the criminal justice system, particularly at the elementary and secondary education levels.

## Capital Litigation Committee:

(3) The Committee unanimously recommends that a comprehensive statewide study be undertaken to address the following list of issues:

- Delay in implementing the penalty imposed and consideration of reforms in the review process to make it more timely (revision of RCr 11.42 and possible recommendation to Kentucky Supreme Court regarding stay practice);
- Incorporate balanced and systemic input, including prosecution and defense and victims' families, into any study;
- Effective assistance of counsel (minimum standards, certification) and training for trial judges;
- Access to DNA evidence;
- Evidentiary issues, e.g. jailhouse informant testimony identified as a problem in other jurisdictions; uncorroborated eye witness testimony; unrecorded confessions;
- Resources for prosecution and defense (establishment of special teams, representation/investigation experts);
- Prosecutor discretion in seeking death penalty; adaptation of federal guidelines or procedures in other states; independent review team to ensure statewide consistency in considering factors of race, geography, gender, economic status, age, cognitive abilities, and aggravating circumstances/ level of culpability; and
- Jury selection and jury instruction in death penalty cases; educating potential jurors on trial process and overall operation of criminal justice system; and criminal background checks of jurors in death penalty cases.

(4) The Committee recommends legislation to adequately fund and support the collection, testing and preservation of DNA evidence to ensure its availability to prosecution and defense in a timely manner in capital cases. It is further recommended that this legislation comply with federal guidelines for incentive funding.

**Corrections/Community-Based Sanctions Committee*:**

(5) The Committee recommends that community-based sanctions be defined as local criminal justice options from the point of arrest through the conclusion of the re-entry process.

**(6) The Committee recommends that the Kentucky State Corrections Commission (KRS 196.081) be reorganized by:**

- **(a) Appropriating full-time staff**
- **(b) Examining and/or broadening membership**
- **(c) Appropriating a sufficient level of funds**
- **(d) Redefining the role of the Commission to include, but not be limited to:**
  - **(1) Developing a statewide strategic plan to foster and encourage the establishment of community-based sanctions as defined**
  - **(2) Providing oversight to local community corrections boards**
  - **(3) Holding community corrections boards accountable through research, evaluation and quality assurance**
  - **(4) Allocating funding to community corrections boards**
  - **(5) Providing for the education of the public and criminal justice and other service system personnel concerning community-based sanctions**

**(7) The Committee recommends that funding should be significantly increased for community-based sanctions.**

**The Committee recommends that funding should be significantly increased to raise salaries for probation and parole officers, permit lower caseloads through hiring of new personnel, and encourage expansion of specialized treatment options.**

**(8) The Committee recommends that Kentucky develop a community-based graduated continuum of treatment services consisting of education, short-term counseling, intensive outpatient services, and residential treatment programs to serve:**

- **(a) Class C/D felons in jails during the period of their incarceration**
- **(b) Persons diverted on felony offenses**
- **(c) Persons serving an alternative sentence in the community**
- **(d) Persons released to the community by probation or parole (including offenders on conditional discharge)**
- **(e) Persons who have served out**

**(9) Drug Courts have proven to be a successful option for treating drug offenders. The Committee recommends that the Commonwealth should fund Drug Courts comprehensively through the General Fund.**

**(10) The Committee recommends that a provision should be made in so far as practicable and as appropriate for transitional housing/half-way housing for offenders returning to the community prior to final discharge and for transportation for persons receiving treatment as a condition of a community-based sanction.**

**(11) The Committee recommends that both faith-based and victims' organizations should be invited to participate with the criminal justice system in recommending policy regarding community-based sanctions and providing treatment and other services.**

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**(12) The Committee recommends that the Kentucky State Corrections Commission and all agencies responsible for training criminal justice and other service systems personnel incorporate educational programming regarding community-based sanctions into existing programs.**

**(13) Restitution to victims is an important component of community-based sanctions and restorative justice. Payment to victims should be the highest priority of any system of collection and distribution. The Committee recommends that steps be taken to streamline and standardize statewide procedures for effective assessment, collection and distribution.**

**(14) Effective community-based alternatives for offenders require proper assessment of their needs and allocation of community resources to address those needs. The Committee recommends implementing an AOC pilot program utilizing caseworkers for community-based sanctions to develop a plan that addresses the concerns of the court and the community as well as the needs of the offender.**

***Minority Report Filed**

Juvenile Justice Committee:

## Education/Prevention

(15) The Committee believes that juvenile sex offender prevention is primary sexual abuse prevention, since a significant number of juvenile sex offenders have also been victims of sexual abuse themselves. A majority of juvenile sex offenders can be treated and their future behavior managed through appropriate early treatment and intervention. The Committee therefore recommends that statewide efforts in prevention, early intervention and treatment for child victims of sexual abuse should continue to be a priority for the Commonwealth.

(16) The Committee believes that effective sexual abuse prevention requires full public and professional awareness of the importance of identifying and treating juvenile sex offenders. The Committee therefore recommends the following:

(a) Public education on child/adolescent sexual development, healthy sexuality and sexual relationships, and the seriousness of juvenile sexual offenses.

(b) Education of judges, prosecutors, defense attorneys, guardian ad litems, and other criminal justice and mental health professionals on the typologies of juvenile sexual offenders, the dynamics of child sexual abuse, and treatment/intervention strategies.

(c) Specialized training for law enforcement and child protective service workers in the identification, investigation, interviewing and coordination of cases involving juvenile sex offenders.

## Court Process

(17) The Committee recognizes that while resources for juvenile sex offenders remain limited within the Commonwealth, treatment is most effective when clinical intervention and consequences are introduced at the earliest possible stage. With public safety and victim protection as the ultimate goal, the Committee recommends that juvenile sex offender treatment be provided in conjunction with accountability and consequences.

(18) (a) The Committee has identified that Kentucky has an insufficient number of qualified, knowledgeable and trained juvenile sex offender assessment and treatment providers. The Committee recommends that the state consider contributing additional resources to develop

additional qualified and trained individuals to conduct juvenile sex offender assessments and to provide juvenile sex offender treatment both in the community and in residential settings.

(b) The Committee is also concerned that there is no certification process for juvenile sex offender providers similar to the adult process. This is especially problematic when youthful offenders are waived to the adult court and must meet the statutory requirement for treatment provided by a certified provider.

With knowledge that the Governor's Council on Domestic Violence and Sexual Assault is proposing to combine the state level certification bodies for both providers of court-ordered treatment in domestic violence cases and providers of adult sex offender treatment, the Committee recommends that a certification process for juvenile sex offender assessment and treatment providers be established and incorporated into the proposal for a unified state level certification board.

**(19) As part of the above recommendation, the Committee recommends that the certification for juvenile sex offender assessment and treatment providers incorporate state-of-the-art and science-based assessment instruments and that once certified, a list of the approved juvenile sex offender providers be made available on a state website to provide a central point of access to resource information.**

**(20) (a) The Committee learned that although youth alleged to be juvenile sex offenders are referred for a juvenile sex offender/mental health assessment (KRS 635.510[3]) prior to disposition, the assessment is generally not done until the post-disposition phase. With knowledge that evaluation and assessment are critical elements in determining the risk of relapse into sexually abusive behavior, the need for clinical intervention, and the required level of supervision, the Committee recommends that the assessments for a juvenile sex offender be conducted prior to disposition in cases in which the judge has discretion in designating a youth as a juvenile sex offender (i.e. misdemeanor and pre-teens).**

**(b) The Committee recommends that the term "Juvenile Sex Offender Assessment" be defined in the statutes so that the elements of a sex offender assessment are differentiated from a "mental health assessment." The statutes should also identify the qualifications required for an individual performing juvenile sex offender assessments.**

(21) The Committee recommends that the Penal Code/Sentencing Committee work with the Juvenile Justice Committee to amend the penal code or the Juvenile Code to consider the age difference between a victim and a perpetrator in determining whether a sexual offense should be a felony when no force is involved. Under current statutes, juveniles often end up with felony charges because of the age of the victim, without regard to the age of the perpetrator. The Committee also recommends consideration of establishing a minimum age under which a juvenile perpetrator cannot be charged with a Class A felony.

(22) (a) The Committee notes that there is a large gap in our existing system regarding juvenile sex offenders who are determined to be incompetent to be adjudicated as sex offenders, but who have real treatment needs and issues. The current system does not provide any resources or support for these types of juveniles. The Committee recommends that this issue be given further study to determine why these resources are not available and how these needs should be addressed.

(b) The Committee heard testimony indicating that in some instances, there is a lack of communication between delinquency, dependency, family and felony courts which has resulted in contradictory court orders and fragmented responses. The Committee recommends that the Administrative Office of the Courts establish a data system that will enable Family Courts

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along with District and Circuit Courts to track files across systems so that judges in all courts can be aware of orders and issues affecting children before them in those other courts.

(23) Under current law, certain juvenile sex offenders prosecuted as youthful offenders are not eligible for probation. The Committee recommends that the Penal Code/Sentencing Committee consider whether juvenile sex offenders who are prosecuted as youthful offenders should be eligible for probation (see KRS 640.040).

## Services/Resources

(24) The Committee consistently heard testimony regarding the lack of juvenile sex offender treatment resources across the state, particularly on an outpatient basis. This is especially troubling in light of experience which suggests that the majority of juvenile sex offenders can safely be treated in the community and that treatment of juveniles who engage in sexually abusive behaviors has the potential to significantly reduce further victimization by these individuals. The Committee learned that Kentucky has limited resources for inpatient treatment of juvenile sex offenders. The Committee also learned that involvement of the juvenile sex offender's family in treatment represents a critical element.

**The Committee therefore recommends the development of statewide "best practice" models for services to juvenile sex offenders. This should include juvenile sex offender specific intervention and supervision in the following settings: outpatient, day treatment, group home, therapeutic foster homes, inpatient, residential and secure confinement. The Committee further recommends that aftercare and transitional programming be incorporated into the continuum along with opportunities for the offender to make monetary and other appropriate restitution to victims. In addition to specific intervention and supervision, "best practice" models should also address early identification, assessment, investigation, prosecution, adjudication, education, training, research and program evaluation.**

**(25) The Committee recommends that specialized juvenile sex offender treatment programs be developed for the following populations:**

- **(a) Mentally ill/emotionally disturbed youth**
- **(b) Developmentally disabled youth**
- **(c) Youth with culturally specific needs**
- **(d) Sexually reactive youth (younger children with sexual behavior problems)**
- **(e) Female juvenile sex offenders**
- **(f) Non-admitters**
- **(g) Youth with substance abuse issues**

**(26) With knowledge that sexual abuse is a behavior which can be extremely traumatic for the victim, regardless of the age of the offender who commits the offense, the Committee recommends that a comprehensive continuum of services be available to the victims of juvenile sex offenders. The Committee further recommends that the Commonwealth adopt a victim-centered approach to sex offender management by involving victim service professionals in sex offender supervision and policy development to ensure that the concerns and needs of victims are addressed.**

**(27) The Committee recommends conducting a study to explore the possibility of providing automated notification information to victims of juvenile sex offenders.**

**(28) The Committee recognizes the need for a truly collaborative approach to managing child and adolescent sex offenders. In order to monitor victim safety and to facilitate successful**

**reintegration of the offender into the community, information sharing and close coordination of treatment efforts with child protective services, the school system, juvenile probation workers, and law enforcement agencies is required. The Committee recommends that the Juvenile Justice Committee address this in its study of information sharing in the juvenile justice system.**

**Additional Statutory Recommendations**

**(29) The Committee supports legislation sponsored by the Department of Juvenile Justice to extend DJJ jurisdiction beyond age 18 for Youthful Offenders that are responding to treatment. The Committee recommends that the Criminal Justice Council endorses and actively supports passage of this proposal during the 2002 session of the Kentucky General Assembly.**

(30) The Committee is aware that there is no statutory definition of mental retardation as it pertains to juvenile offenders, and in particular juvenile sex offenders, other than the definition included in KRS 532.130[2] relating to imposition of the death penalty. The Committee recommends that the Juvenile Code be amended to include such a definition.

(31) The Committee heard testimony pertaining to unintended consequences resulting from the application of adult laws to juveniles. As an example, the Committee learned that Megan's Law (KRS 17.495-17.991) includes a requirement that a sex offender not live within 1000 feet of a school or daycare, yet Youthful Offenders who are probated and deemed to be low risk may in fact be living at home with their parents and attending school. The Committee recommends that the Commonwealth proceed cautiously in any future considerations of applying adult laws to juveniles.

(32) The Committee supports legislation proposed by the Department of Juvenile Justice that seeks to provide a privilege for information revealed by a juvenile during sex offender treatment (this privilege exists for adults under KRS 197.440, but not for juveniles under current law).

## Law Enforcement Issues Committee:

(33) The Committee recommends revision of Kentucky's hate crime statute (KRS 532.031) to clarify the following procedural issues:

(a) Adequate notice to the defendant
(b) Trial process
(c) Sentencing process

**(34) The Committee recommends revision of Kentucky's hate crime statute (KRS 532.031) to include a penalty enhancement provision.**

## Unified Criminal Justice Information System:

**(35) A preliminary budget request of $10,447,750 for the UCJIS Project was submitted to the Criminal Justice Council and unanimously endorsed. The 2002-2004 estimated budget includes funding for staff and travel expenses as well as new general fund dollars to support implementation of the following projects: Criminal History; Records Management System/Computer-Aided Dispatch Joint Project with Locals; State Funding to Leverage Federal Dollars; Automated Warrants System; Jail Management System, and Prosecutor Management System.** ■

# Key Criminal Justice Websites

There are many great Internet sites available for the criminal defense lawyer. Many of them, such as lexis.com or westlaw.com, or even findlaw, we use in our everyday practice, but some we know much less about and may not even know they exist. While many of the larger web indexes clearly identify statues, cases, bar associations, and legal news sites online, they sometimes overlook general criminal justice materials like statistics, studies and reports. This article is an attempt to point out locations, often overlooked where you can find this type of material. Below you will find a few Kentucky sites and my top ten general criminal justice sites. The sites were chosen for both content and links to additional material.

**Kentucky sites**

Ky. Dept. of Corrections (http://www.cor.state.ky.us/) - Contains the Ky. Offender lookup system.

Kentucky State Data Center (http://cbpa.louisville.edu/ksdc/) - contains census data for Kentucky as well as data on income levels, education, housing and employment.

Kentucky State Police (http://www.state.ky.us/agencies/ksp/ksphome.htm) - contains the Ky. Sex offender registry, *Crime in Kentucky*, and Traffic statistics.

**National Sites**

1. U.S. Dept of Justice: Office of Justice Programs (http://www.ojp.usdoj.gov/) - parent agency for the Bureau of Justice Assistance, Bureau of Justice Statistics, National Institute of Justice, Office of Juvenile Justice and Delinquency Prevention, the Violence Against Women Office and others; has links to the majority of federal publications on criminal justice issues.

2. American Bar Association: Criminal Justice Section (http://www.abanet.org/crimjust/home.html) - Contains all of the ABA's criminal justice standards, *Criminal Justice magazine*, and a variety of other criminal justice resources.

3. National Criminal Justice Reference Service (http://www.ncjrs.org/) - Clearinghouse for federal government criminal justice resources. LOTS of materials available, including the *Sourcebook of Criminal Justice Statistics.*

4. National Archive of Criminal Justice Data (http://www.icpsr.umich.edu/NACJD/index.html) - The NACJD Web site provides downloadable access to hundreds of criminal justice data collections **free of charge**.

5. The Sentencing Project (http://www.sentencingproject.org/) - provides on-line reports and publications about alternative sentencing and criminal justice issues.

6. Uniform Crime Reports (http://fisher.lib.virginia.edu/crime/) - need to know crime statistics for your county or counties. This is the place to look.

7. Vera Institute of Justice (http://www.vera.org) - provides access to many publications and ideas on criminal justice reform.

8. Justice Research and Statistics Association (http://www.jrsa.org/) - provides a clearinghouse of current information on state criminal justice research, programs, and publications and reports on the latest research being conducted by Federal and State agencies.

9. Center on Juvenile and Criminal Justice (http://www.cjcj.org/) - Nonprofit organization devoted to alternatives to incarceration. A wealth of downloadable reports available.

10. Federal Bureau of Investigation: Uniform Crime Reports (http://www.fbi.gov/ucr/ucr.htm) - Not by county like the Uniform Crime reports from the University of Virginia (#6 above), but has figures through 2000.

I want to point out that this is only a tiny portion of the information available on the internet. If you have a topic on which you want to locate information, try searching using Yahoo or another of the internet search engines, I guarantee you will find information that will be of help to you. If you are unsure how to limit your searches to obtain the best results, talk to your local librarian. Most librarians have received intensive training, both professional and on the job, on how best to locate information on the Internet. ■

**Will Hilyerd**
**Assistant Public Advocate**
**100 Fair Oaks Lane, Suite 302**
**Frankfort, Ky. 40601**
**(502) 564-8006 x120**
**Fax: (502) 564-7890**
**e-mail: whilyerd@mail.pa.state.ky.us**

# Statistics on Inmates Released in FY 01
# Based on Sentence Length, All Offenders, Drug Offenders

| Median Time Served (months) | | | | | | | |
|---|---|---|---|---|---|---|---|
| | 1 Yr | 2 Yr | 3 Yr | 4 Yr | 5 Yr | 6 Yr | 7 Yr |
| All Offenders | 7.6 | 15.3 | 21.9 | 28.9 | 21.6 | 26.1 | 31.7 |
| Drug Offenders | 7.5 | 14.9 | 17.1 | 20.1 | 12.9 | 15.9 | 18.6 |

## Type of institution released from

(This only defines the type of institution released from, not how much of their sentence they served at that type of institution)

| Number of Inmates Released | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 Year | | 2 Years | | 3 Years | | 4 Years | | 5 Years | | 6 Years | | 7 Years | |
| | All | Drug | All | Drug | All | Drug | All | Drug | All | Drug | All | Drug | All | Drug |
| Local | 987 | 297 | 703 | 195 | 467 | 135 | 128 | 45 | 756 | 337 | 72 | 41 | 84 | 44 |
| State | 239 | 56 | 157 | 33 | 111 | 35 | 41 | 12 | 513 | 231 | 153 | 64 | 172 | 58 |

| Initial Parole Board Hearings FY 01<br>Parole Board decisions by % of hearings | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 Year | | 2 Years | | 3 Year | | 4 Years | | 5 Years | | 6 Years | | 7 Years | |
| | All | Drug | All | Drug | All | Drug | All | Drug | All | Drug | All | Drug | All | Drug |
| Defer | .6 | .4 | 3.8 | 5.4 | 28.2 | 33.1 | 45.7 | 64.3 | 67.1 | 64.5 | 68.3 | 53.5 | 70.1 | 59.0 |
| Serve Out | 94.7 | 91.2 | 83.2 | 74.1 | 57.6 | 46.9 | 43.2 | 21.4 | 15.1 | 5.1 | 9.3 | 7.1 | 7.6 | 5.1 |
| Parole | 4.7 | 8.4 | 13.0 | 20.5 | 13.8 | 20.0 | 11.1 | 14.3 | 17.3 | 29.8 | 22.5 | 39.4 | 22.3 | 35.9 |

# National Consensus on Fair Administration of Death Penalty Reached; Kentucky Criminal Justice Council Makes 2 Capital Recommendations

I. **National Consensus on Fair Administration of Death Penalty**

The Constitution Project has issued *Mandatory Justice: Eighteen Reforms to the Death Penalty* (July 2001) found at: http://www.constitutionproject.org/dpi/Mandatory_Justice_7-05-01.PDF. The Project's death penalty initiative and its bipartisan, blue ribbon committee issued this major national report after the group conducted a yearlong review of the death penalty in the United States.

The 30-member death penalty initiative is composed of both supporters and opponents of the death penalty. It includes former judges, state attorneys general, federal prosecutors, law enforcement officials, governors, mayors, and journalists, as well as defense attorneys, religious leaders, victims' rights advocates, Republicans and Democrats, conservatives and liberals. Co-Chairs of this 30-member group are:

- Charles F. Baird *former Judge, Texas Court of Criminal Appeals*;
- Gerald Kogan, *former Chief Justice, Supreme Court of the State of Florida; former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida*;
- Beth A. Wilkinson**,** *Prosecutor, Oklahoma City bombing case;*
- William Sessions, FBI Director in the Reagan and Bush administrations, was a member.

Their Report is a comprehensive consensus on capital punishment reached by an ideologically and politically diverse group with extensive death penalty and criminal justice experience. One of its co-chairs, Judge Baird, has recently come to Kentucky and addressed the Kentucky Criminal Justice Council on the work of this national effort. The Report recommended 18 reforms to insure the fair administration of the death penalty:

**Effective Counsel**

**1) Creation of Independent Appointing Authorities**

Each state should create or maintain a central, independent appointing authority whose role is to "recruit, select, train, monitor, support, and assist" attorneys who represent capital clients (ABA Report). The authority should be composed of attorneys knowledgeable about criminal defense in capital cases, and who will operate independent of conflicts of interest with judges, prosecutors, or any other parties. This authority should adopt and enforce a set of minimum standards for appointed counsel at all stages of capital cases, including state or federal post-conviction and *certiorar*i. An existing statewide public defender office or other assigned counsel program should meet the definition of a central appointing authority, providing it implements the proper standards and procedures.

**2) Provision of Competent and AdequatelyCompensated Counsel at All States of Capital Litigation and Provision of Adequate Funding for Expert and Investigative Services**

Every capital defendant should be provided with qualified and adequately compensated attorneys at every stage of the capital proceeding, including state and federal post-conviction and *certiorar*i. Each jurisdiction should adopt a stringent and uniform set of qualifications for capital defense at each stage of the proceedings. Capital attorneys should be guaranteed adequate compensation for their services, at a level that reflects the "extraordinary responsibilities inherent in death penalty litigation" (ABA Report). Such compensation should be set according to actual time and service performed, and should be sufficient to ensure that an attorney meeting his or her professional responsibility to provide competent representation will receive compensation adequate for reasonable overhead; reasonable litigation expenses; reasonable expenses for expert, investigative, support, and other services; and a reasonable return.

**3) Replacement of the *Strickland v. Washington* Standard for Effective Assistance of Counsel at Capital Sentencing**

Every state that permits the death penalty should adopt a more demanding standard to replace the current test for effective assistance of counsel in the capital sentencing context. Counsel should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, be zealously committed to the capital case, and possess adequate time and resources to prepare. (NLADA Standards)

Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the sentencing hearing was not affected by the attorney's incompetence. Moreover, there should be a strong presumption in favor of the attorney's obligation to offer at least some mitigating evidence.

**Prohibiting Execution in Cases Involving Questionable Categories of Defendants and Homicides**

To reduce the unacceptably high risk of wrongful execution in certain categories of cases, to ensure that the death penalty is reserved for the most culpable offenders, and to effectuate the deterrent and retributive purposes of the death penalty, jurisdictions should limit the cases eligible for capital punishment to exclude those involving (1) persons with mental retardation; (2) persons under the age of eighteen at the time of the crimes for which they were convicted; and (3) those convicted of felony murder who did not kill, intend to kill, or intend that a killing occur.

**Expanding and Explaining Life without Parole (LWOP)**

**1) Availability of Life Sentence without Parole**

In all capital cases, the sentencer should be provided with the option of a life sentence without the possibility of parole.

**2) Meaning of Life Sentence without Parole (Truth in Sentencing)**

At the sentencing phase of any capital case in which the jury has a role in determining the sentence imposed on the defendant, the court shall inform the jury of the minimum length of time those convicted of murder must serve before being eligible for parole. However, the trial court should not make statements or give instructions suggesting that the jury's verdict will or may be reviewed or reconsidered by anyone else, or that any sentence it imposes will or may be overturned or commuted.

**Safeguarding Racial Fairness**

Each jurisdiction should undertake a comprehensive program to help ensure that racial discrimination plays no role in its capital punishment system, and to thereby enhance public confidence in the system. Because these issues are so complex and difficult, two approaches are appropriate. One very important component – perhaps the most important – is the rigorous gathering of data on the operation of the capital punishment system and the role of race in it. A second component is to bring members of all races into every level of the decision-making process.

**Proportionality Review**

In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner; (2) provide a check on broad prosecutorial discretion; and (3) prevent discrimination from playing a role in the capital decision-making process, every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner.

**Protection against Wrongful Conviction and Sentence**

**1) Preservation and Use of DNA Evidence to Establish Innocence or Avoid Unjust Execution**

In cases where the defendant has been sentenced to death, states and the federal government should enact legislation that requires the preservation and permits the testing of biological materials not previously subjected to effective DNA testing, where such preservation or testing may produce evidence favorable to the defendant and relevant to the claim that he or she was wrongfully convicted or sentenced. These laws should provide that biological materials must be generally preserved and that, as to convicted defendants, existing biological materials must be preserved until defendants can be notified and provided an opportunity to request testing under the jurisdiction's DNA testing requirements. These laws should provide for the use of public funds to conduct the testing and to appoint counsel where the convicted defendant is indigent. If exculpatory evidence is produced by such testing, notwithstanding other procedural bars or time limitations, legislation should provide that the evidence may be presented at a hearing to determine whether the conviction or sentence was wrongful. If the conviction or sentence is shown to be erroneous, the legislation should require that the conviction or sentence be vacated.

**2) Lifting Procedural Barriers to Introduction of Exculpatory Evidence**

State and federal courts should ensure that every capital defendant is provided an adequate mechanism for introducing newly discovered evidence that would otherwise be procedurally barred, where it would more likely than not produce a different outcome at trial, or where it would undermine confidence in the reliability of the sentence.

**Duty of Judge and Role of Jury**

**1) Eliminating Authorization for Judicial Override of a Jury's Recommendation of a Life Sentence to Impose a Sentence of Death**

Judicial override of a jury's recommendation of life imprisonment to impose a sentence of death should be prohibited. Where a court determines that a death sentence would be disproportionate, where it believes doubt remains as to the guilt of one sentenced to death, or where the interests of justice require it, the trial court should be granted authority to impose a life sentence despite the jury's recommendation of death.

**2) Lingering (Residual) Doubt**

The trial judge, in each case in which he or she deems such an instruction appropriate, should instruct the jury, at the conclusion of the sentencing phase of a capital case and before the jury retires to deliberate, as follows: "If you have any lingering doubt as to the defendant's guilt of the crime or any element of the crime, even though that doubt did not rise to the level of a reasonable doubt when you found the defen-

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dant guilty, you may consider that doubt as a mitigating circumstance weighing against a death sentence for the defendant."

**3) Ensuring That Capital Sentencing Juries Understand Their Obligation to Consider Mitigating Factors**

Every judge presiding at a capital sentencing hearing has an affirmative obligation to ensure that the jury fully and accurately understands the nature of its duty. The judge must clearly communicate to the jury that it retains the ultimate moral decision-making power over whether the defendant lives or dies, and must also communicate that (1) mitigating factors do not need to be found by all members of the jury in order to be considered in the individual juror's sentencing decision, and (2) mitigating circumstances need to be proved only to the satisfaction of the individual juror, and not beyond a reasonable doubt, to be considered in the juror's sentencing decision. In light of empirical evidence documenting serious juror confusion on the nature of the jury's obligation, judges must ensure that jurors understand, for example, that this decision rests in the jury's hands, that it is not a mechanical decision to be discharged by a numerical tally of aggravating and mitigating factors, that it requires the jury to consider the defendant's mitigating evidence, and that it permits the jury to decline to sentence the defendant to death even if sufficient aggravating factors exist.

The judge's obligation to ensure that jurors understand the scope of their moral authority and duty is affirmative in nature. Judges should not consider it discharged simply because they have given standard jury instructions. If judges have reason to think such instructions may be misleading, they should instruct the jury in more accessible and less ambiguous language. In addition, if the jury asks for clarification on these difficult and crucial issues, judges should offer clarification and not simply direct the jury to reread the instructions.

**Role of Prosecutors**

**1) Providing Expanded Discovery in Death Penalty Cases and Ensuring That in Death Penalty Prosecutions Exculpatory Information Is Provided to the Defense**

Because of the paramount interest in avoiding the execution of an innocent person, special discovery provisions should be established to govern death penalty cases. These provisions should provide for discovery from the prosecution that is as full and complete as possible, consistent with the requirements of public safety.

Full "open-file" discovery should be required in capital cases. However, discovery of the prosecutor's files means nothing if the relevant information is not contained in those files. Thus, to make discovery effective in death penalty cases, the prosecution must obtain all relevant information from all agencies involved in investigating the case or analyzing evidence. Disclosure should be withheld only when the prosecution clearly demonstrates that restrictions are required to protect witnesses' safety or shows similarly substantial threats to public safety.

If a jurisdiction fails to adopt full open-file discovery for its capital cases, it must ensure that it provides all exculpatory *(Brad*y) evidence to the defense. In order to ensure compliance with this obligation, the prosecution should be required to certify that (1) it has requested that all investigative agencies involved in the investigation of the case and examination of evidence deliver to it all documents, information, and materials relevant to the case and that the agencies have indicated their compliance; (2) a named prosecutor or prosecutors have inspected all these materials to determine if they contain any evidence favorable to the defense as to either guilt or sentencing; and (3) all arguably favorable information has been either provided to the defense or submitted to the trial judge for *in camera* review to determine whether such evidence meets the *Brady* standards of helpfulness to the defense and materiality to outcome. When willful violations of *Brady* duties are found, meaningful sanctions should be imposed.

**2) Establishing Internal Prosecutorial Guidelines or Protocols on Seeking the Death Penalty Where Questionable Evidence Increases the Likelihood That the Innocent Will Be Executed**

Because eyewitness identifications by strangers are fallible, co-defendants are prone to lie and blame other participants in order to reduce their own guilt or sentence, and jailhouse informants frequently have the opportunity and the clear motivation to fabricate evidence to benefit their status at the expense of justice, prosecutors should establish guidelines limiting reliance on such questionable evidence in death penalty cases. The guidelines should put that penalty off limits where the guilt of the defendant or the likelihood of receiving a capital sentence depends upon these types of evidence and where independent corroborating evidence is unavailable.

**3) Requiring Mandatory Period of Consultation before Commencing Death Penalty Prosecution**

Before the decision to prosecute a case capitally is announced or commenced, a specified time period should be set aside during which the prosecution is to examine the propriety of seeking the death penalty and to consult with appropriate officials and parties.

**II. Kentucky Criminal Justice Council Makes Capital Recommendations**

The Kentucky Criminal Justice Council Capital committee unanimously recommended and the Council approved two recommendations relevant to the fair administration of the death penalty in Kentucky:

1) Conduct a comprehensive statewide study to address:

- Delay in implementing the penalty imposed and consideration of reforms in the review process to make it more timely (revision of RCr 11.42 and possible recommendation to Kentucky Supreme Court regarding stay practice);
- Incorporate balanced and systemic input, including prosecution and defense and victims' families, into any study;
- Effective assistance of counsel (minimum standards, certification) and training for trial judges;
- Access to DNA evidence;
- Evidentiary issues, e.g. jailhouse informant testimony identified as a problem in other jurisdictions; uncorroborated eye witness testimony; unrecorded confessions;
- Resources for prosecution and defense (establishment of special teams, representation/investigation experts);
- Prosecutor discretion in seeking death penalty; adaptation of federal guidelines or procedures in other states; independent review team to ensure statewide consistency in considering factors of race, geography, gender, economic status, age, cognitive abilities, and aggravating circumstances/level of culpability; and
- Jury selection and jury instruction in death penalty cases; educating potential jurors on trial process and overall operation of criminal justice system; and criminal background checks of jurors in death penalty cases.

2) Enact legislation to adequately fund and support the collection, testing and preservation of DNA evidence to ensure its availability to prosecution and defense in a timely manner in capital cases. It is further recommended that this legislation comply with federal guidelines for incentive funding.

Public Advocate Ernie Lewis represents DPA on the Kentucky Criminal Justice Council. Deputy Public Advocate Ed Monahan represents DPA on the Council's Capital Committee. ■

# DISTRICT COURT COLUMN

## Discovery Motion Practice: What You Get, What You Might Get, and What You Owe Part One: What You Get

*Scott West*

From the moment we get our second criminal case we begin to develop a form practice. We may have taken the trouble to draft a discovery motion for our first criminal case, but when we get our second, we automatically start with the motion we filed in the first case and tailor it for the new case. After all, criminal defense is a high volume business and no one has time to "re-invent the wheel" and draft from scratch a discovery motion which will merely recite the Criminal Rule on discovery (RCr 7.24) and regurgitate the list of items it contains.

If we are lucky someone in our office will already have a form that is tailored to a specific type of case – say, a DUI case – which, in addition to asking for the usual, specifically requests the lab results of a urine or blood test, or the maintenance log for the breathalyzer used by the police. Pull up the form on the computer, change the client's name, the case number, the date, and v*oila!* In seconds, there is a file-ready motion for discovery! Once the order granting discover is signed, the Commonwealth will be obliged to start giving over whatever it has that is covered by the motion.

Sometimes, though, maybe years down the road, the wheels fall off. The prosecutor objects to one of your requests and the judge does not just automatically let you have the item. "Why do you need it," she may ask? Or, "do you have any authority which entitles you to that?" Or, "how is this request material or reasonable?"

Ulp! "Well, it's in our office's form motion" is NOT the answer. Of course it is in the form motion, but *why* is it in the form motion? Without having to page through your criminal statute book, can you come up with the authority for the request, quickly?

This month's column offers a fresh look (more aptly, a "refresher" look) at discovery practice. This column is not an indictment on the use of forms – we cannot practice efficiently without them. Rather, the reader is merely asked to pause and consider the law which allows us – or might allow us – what we ask for all the time.

This article is presented in three installments: Part One discusses the discovery items which the defendant definitely gets upon request, whether allowed by statute, Kentucky common law, or United States Supreme Court cases. Part Two discusses what the defendant *might* get, depending upon the circumstances. Part Three discusses what the Defendant owes to the Commonwealth under the duty of reciprocal discovery.

And because the District Court Column is intended to be a "user-friendly" forum, there is also included with Part Two a sidebar with short annotations of "Ten Discovery Cases to

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Know (Or At Least Have Handy)!" The sidebar can be easily copied and pasted inside the Criminal Law Statute Book which most criminal defense attorneys take with them to court. In fact, the last seven pages of West's *2000-01 Criminal Law of Kentucky* are blank, and just perfect for pasting this sidebar along with any other "cheat sheets" you may have.

## I. Distinguishing what you *definitely* get from what you *might* get.

One mistake easily made when relying on a form motion which requests everything in Rule of Criminal Procedure 7.24 is thinking that you are automatically entitled to everything contained in it. Actually, the rule divides discoverable items into two categories: (1) Those which the Commonwealth "shall disclose" upon written request, and (2) those which the court "may order" upon a showing of materiality and reasonableness. Of course, the standard form motion will boldly ask for all items contained in both subsections, without making any distinction between those items for which discovery is mandatory, and those for which discovery is discretionary with the court. However, just in case the court asks you to support your argument that you are entitled to all requested items, you have to know the difference.

A second easily made mistake is thinking that you are entitled *only* to those things listed in RCr 7.24. The law entitles you to much more than is contained in the rules. Among those items which you definitely get (but are not listed in the rules) are lab samples (if available), a witness list, and anything exculpatory.

## II. What you Definitely Get Upon Request

As stated above, what you definitely get is governed by Criminal Rule of Procedure 7.24, Kentucky case law, and, in the case of exculpatory or impeachment evidence, United States Supreme Court cases.

### A. RCr 7.24(1): Items Allowed Upon Written Request

Rule of Criminal Procedure 7.24(1) lists the items for which disclosure is mandatory:

> Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance of any **oral incriminating statement** known by the attorney for the Commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) **written or recorded statements or confessions** made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth, and (b) **the results or reports of physical or mental examinations,** and/or **scientific tests or experiments** made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth. [Emphasis added.]

#### 1. Defendant's Incriminating Statements or Confessions:

When a defendant's incriminating statement has been tape recorded, video-taped, or handwritten by the defendant, it is a simple matter for the prosecutor to turn over the statement to the defense. It is easily identifiable, recognizable, and is probably the first investigative item placed into the file by the police. There is no issue concerning whether the statement is "known" to the attorney for the Commonwealth – it's right there in front of him.

When a defendant's incriminating oral statement is not recorded, and the Commonwealth Attorney "knows" of the statement, the Commonwealth must disclose the substance of the statement to the defense, upon written request. It is problematic when the defendant makes incriminating statements to the police but the police do not record the substance of the statement in the report given to the prosecutor. In such an instance, is the knowledge of the police imputed to the prosecutor?

*Anderson v. Commonwealth*, Ky., 864 S.W.2d 909 (1993) suggests that the answer to the question is "yes." In *Anderson*, the Supreme Court reversed a conviction where the prosecution's witness, a social worker for the Cabinet of Human Resources, testified about a statement made by the defendant to the social worker. The defendant had told the social worker that on at least one occasion she had tried to keep her husband, the co-defendant, from abusing her child. This statement was incriminating because, while the defendant on the stand had denied having any knowledge that her husband was abusing her child, her statement to the social worker statement proved knowledge of the abuse.

The substance of the oral statement had been written in the notes of the social worker. The prosecutor objected to providing the CHR records, which contained the notes, to the defendant on the grounds they were confidential. The trial court examined the records *in camera*, but did not allow any of the records – including the notes of the oral statement by the defendant – to be given to the defense.

At trial, the court over defendant's objection allowed the statement into evidence even though the substance of the statement had not been disclosed to the defendant. The Supreme Court vacated the conviction and remanded for a new trial, stating that:

> Failure to provide discovery had a double-barreled effect. First, it denied the defense the opportunity to prepare for and refute the incriminating evidence by cross-examination or other proof, if such was possible. Further, it denied these appellants the opportunity to seek separate trials on grounds that an incriminating statement which was admissible against the one making it was hearsay as to the other defendant, but was being used against both….
>
> The issue here is not when and whether CHR records are entitled to the cloak of confidentiality. **When information disclosed in those records is discoverable in a criminal case, either because it is exculpatory or because the records reflect incriminating statements which may be used against the accused, those records must be provided**. [Emphasis added.]

Thus, the knowledge of the social worker was imputed to the prosecutor, who had access to the file. Whether the Commonwealth Attorney had *actual* knowledge of the contents of the CHR file was not discussed. The court stated that it was irrelevant whether the mistake of not recognizing the incriminating statement was the court's or the Commonwealth's. The court deemed the substance of the oral statement discoverable upon deciding that the statement was in the CHR file, which was requested by the defense.

The court did not employ a "harmless error" analysis, but immediately vacated the conviction upon deciding that the substance of the statement was discoverable, but not provided. To emphasize this point, the court stated: "Whether the mistake that was made was inadvertent or intentional, and whether the mistake was made by the Commonwealth's Attorney or by the trial court, or both, is immaterial. In either case, the on-going discovery order and the mandates of RCr 7.24 required the exclusion of this evidence when it had not been provided on discovery." By not engaging in a harmful error analysis, the court seems to be emphasizing that "shall" means "shall," and failure to provide a mandatorily discoverable item will result in reversal.

**2. Results or Reports of Physical or Mental Examinations:**

While "physical or mental examination" literally may refer to any person's physical or mental examination, in practice, the rule refers to physical or mental examinations of alleged victims. It is unlikely that the Commonwealth would have medical or psychiatric records of a defendant that are not either already in the possession of the defendant, or which are not easily obtainable by the defendant. Most commonly, reports of the examination of alleged victims are needed in sexual offense cases, assault cases, and any other case which has "physical injury" or "serious physical injury" as an element, or which uses injury to enhance the penalty of an offense. When the extent of injury is an issue, it is critical to get the records of any physician the alleged victim was examined by in connection with the injury.

Often, however, a prosecutor will not have medical records in the file. Since the law does not necessarily require the prosecution to put on expert or medical testimony in order to prove physical injury or serious physical injury (*see Cooper v. Commonwealth*, Ky., 569 S.W.2d 668 (1978)), and since some injuries are so apparently severe (*e.g.*, a leg blown off by a bomb), there may be no need to have medical reports in the file to prove the seriousness of the injury. Thus, if you have agreed to "open file" discovery, and the records are not in the file, you could be deprived of valuable information. You need to have the medical records, even if extent of injury is not apparently an issue, for two reasons:
First, the injury actually might not be as serious as it seems. For example, it seems intuitive that being shot in the chest with a gun would automatically result in a serious physical injury. However, one case held that a man shot in the chest with birdshot was not so seriously injured as to warrant a first degree assault (as opposed to second degree) conviction. *Luttrell v. Commonwealth*, Ky., 554 S.W.2d 75 (1977). Medical reports will show whether or not a wound is superficial, or actually life or life-style threatening.

Second, under the treating-physician exception to the hearsay rule (KRE 803(4)) any statements made to the doctor may be admissible in court. Perhaps the victim said something to his doctor which bolsters a defense (accident, self-defense, etc.). The doctor may have written it in his report.

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**3. Scientific Tests or Experiments Made in Connection with the Case:**

Lab reports created by the Commonwealth are the most common tests or experiments contemplated by the rule. These would include results of breathalyzer machines, urine tests, blood tests, fingerprint analysis, gun or ballistic examinations, DNA analysis, hair or fiber analysis, and drug analysis. Some of these are "scientific" while others are merely technical or experimental. They are all available upon written request, and they are almost always provided by the Commonwealth or County without argument. But the receipt of the finished lab report should begin, not end, the search for scientific or technical evidence made by the Commonwealth.

In addition to the conclusory, often single-paged lab report, what about the work papers of the scientist/technician who performed this test or experiment? Is the sample still available? What is the plan if neither the sample nor work papers are available? Although RCr 7.24(1) does not expressly state that a defendant is entitled to either the sample itself, if it still exists, or the underlying lab reports which led to the results contained in the lab report, there is no doubt that the defendant is entitled to them. In *Green v. Commonwealth*, Ky. App., 684 S.W.2d 13 (1984), the court held:

> Undoubtedly, some states have procedural rules concerning the preservation of testing materials and the right of a defendant in a criminal prosecution to perform his own testing. We do not**. Nevertheless, we think the right to testing is implicit under RCr 7.24.** Further, the case of *James v. Commonwealth*, Ky., 482 S.W.2d 92 (1972), recognizes this right.

There is a *right* to test the lab samples. The importance of this holding cannot be overstated. Sometimes a prosecutor will argue that the sample itself is a "tangible object" and therefore is governed by RCr 7.24(2), not 7.24(1). Subsection (2), as will be discussed in "Part Two: What You Might Get," requires discovery only upon a showing by the defendant of materiality and reasonableness. However, *Green* and *James* take lab samples out of subsection (2) and places it into subsection (1); when there is a "right" to test, there is no obligation to prove materiality or reasonableness to the trial court that. Simply ask, and you shall receive.

If the lab samples have been unnecessarily and unintentionally destroyed, so that you cannot receive, then you are entitled to the work papers of the lab technician:

> We hold the unnecessary (though unintentional) destruction of the total drug sample, after the defendant stands charged, renders the test results inadmissible, unless the defendant is provided a reasonable opportunity to participate in the testing, or is provided with the notes and other information incidental to the testing, sufficient to enable him to obtain his own expert evaluation. [*Id.* at 16.]

By implication, if the notes and other information incidental to the testing is insufficient to allow the defendant's expert to evaluate the results of the test, then the test results themselves are inadmissible. While the holding does not necessarily require that the "information" be in writing, if the lab tech does it all "in her head," leaving no paper trail, she is risking the admissibility of the evidence; the expert's ability to obtain his own evaluation will be equal to the ability of the lab tech to articulate the step-by-step procedures she employed in reaching the results, and the values for each mathematical or chemical equation she used in the process.

Note that the above holdings specifically apply to the *unnecessary* and *unintentional* destruction of samples. *Green* does not address the situation where the lab tech has but a small sample and it must be *necessarily* and *intentionally* destroyed to complete the testing. Nevertheless, due process for the Defendant may require that the Commonwealth invite the defendant to participate in lab testing when the sample is going to be destroyed in the process of testing.

The unnecessary and *intentional* destruction of samples is a different matter altogether. (*See Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534 (1988) to see what happened when a prosecutor intentionally erased taped statements. Presumably, a similar result would follow for the intentional, unnecessary destruction of lab samples.)

**B. Grand Jury Testimony (RCr 5.16)**

RCr 5.16(3) allows the defendant to get a transcript or any stenographic report or a duplicate of any mechanical recording relating to his or her indictment. The failure of the Commonwealth to have a record made is grounds for dismissal, unless good cause is shown. "Mechanical failure of the recording device" is specifically stated by the rule to constitute "good cause." RCr 5.16(2)

When a mechanical failure results in an incomplete transcript, or no transcript, the criminal defense lawyer should quickly bring this to the attention of the Com-

monwealth, in writing. Subsequent "mechanical failures" would therefore arguably be the result of human error, the failure to repair the machine.

**C. List of "Known Witnesses"**

RCr 7.24 does not provide that the defendant is entitled to a "witness list," and its absence from the rule prompts many prosecutors to argue that a defendant is not entitled to one. Certainly, if the discovery motion requests a list of all persons "present at the scene," or "the names and addresses of any and all witnesses which the prosecution intends to call, or may call, to trial," then the prosecutor's objection is well taken. In *Lowe v. Commonwealth*, Ky., 712 S.W.2d 944 (1986), the Supreme Court reaffirmed that "a list of witnesses is not among the items of information" required by RCr 7.24 to be given to criminal defendant. A court order which required discovery of the names of all persons present at the crime scene was held to be "overbroad" and inconsistent with RCr 7.24.

However, in denying the defendant a list of all persons present, the court let stand a decision which allows a defendant to get a list of *known witnesses*. The Court distinguished *Burks v. Commonwealth*, Ky., 471 S.W.2d 298 (1971):

A review of *Burks* shows that case to be distinguishable from the case at bar. In *Burks*, this court held that:

> [W]hen a police informant participates in or places himself in a position of observing a criminal transaction he ceases to be merely a source of information and becomes a witness…. There simply can be no valid principle under which the identity of a *known witness* may be concealed from adversary parties… [Emphasis supplied by the Court.]

The discovery order entered in this case was not limited to *known* witnesses, exculpatory witnesses or persons observing or participating in the crime, but instead requested disclosure of "all persons present" at the scene when the eleven counts of theft allegedly occurred. The trial judge's order was overbroad and exceeded the bounds of a Bill of Particulars.

Since *Burks* was distinguished and not overruled, the defendant is still entitled to the identities of known witnesses, persons who observed or participated in the crime, and any witnesses with exculpatory information. If there is "no valid principle" under which the identity of a known witness can be concealed, a witness list – as limited by *Lowe* – comes under the category of those items which you definitely get, upon written request. Out of an abundance of caution, since *Burks* was a Bill of Particulars case, you should probably make this request through a Bill of Particulars. This frees the request from the bondage of the language in RCr 7.24, and makes the issue governed solely by case law.

Finally, be aware that the failure of the Commonwealth to disclose the name of known witness upon request will not result in automatic reversible error if, after disclosure of the witness's identity, the defense counsel has an opportunity to talk to the witness but chooses not to. In *Weaver v. Commonwealth*, Ky., 955 S.W.2d 722 (1977), the Court held:

> The withholding of the identity of an alleged eyewitness to the crime ordinarily would prejudice a defendant's ability to prepare his defense. However, it developed that [the witness] was readily available for interview by defense counsel, who chose not to avail himself of the opportunity….

He cannot intentionally decline to avail himself of that opportunity and then claim on appeal that he was prejudiced.

**C. Exculpatory Evidence- The *Brady, Bagley, Kyles* Trilogy**

In 1963, the United States Supreme Court affirmed a state court's reversal of a murder conviction where the prosecution had suppressed a confession to the murder made by the accomplice of the accused, despite the fact that the defendant had requested a chance to review any statements made by the accomplice outside the courtroom. Although the holding of the case was stated by the Supreme Court to be the necessary extension of prior precedents, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) has become the grandfather of all exculpatory evidence cases. The key holding to the case provides:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Twenty-two years later, in *United States v. Bagley*, 473 US. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) the Supreme Court held that impeachment evidence – any evidence that the defense might have used to show bias or interest – fell within the *Brady* rule.

*Bagley* also stated the standard of *materiality* to be used when determining whether the failure to provide exculpatory or impeachment evidence warrants reversal in a particular case:

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> [A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.
>
> * * *
>
> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

In so holding, the Supreme Court refused to adopt either a more stringent standard (which would have required the defendant to show that, had the evidence been disclosed, there probably would have been an acquittal) or a less stringent standard (which would have required the defense to show only that the undisclosed evidence could have affected the judgment of the jury),

Finally, in *Kyles v. Whitely*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the Supreme Court further clarified the materiality requirement of *Brady* rule by emphasizing that, once a *Brady* violation has been found, it is not subject to further "harmless error" analysis because of high materiality standard for finding a *Brady* violation in the first place. The Court further stated that the impact of undisclosed evidence in a trial is to be considered *collectively*, not item by item. Thus, while any one of three undisclosed items might not be sufficient to warrant a reversal, the cumulative effect of them might.

Perhaps more important to criminal defense lawyers, *Kyles* imposed upon prosecutors a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." The duty is imposed because the prosecution alone can know what is undisclosed, and therefore "must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." *Id.* at 437. Should the prosecutor fail to disclose *Brady* evidence, once the failure is discovered, the materiality test becomes applicable.

The key to preserving a *Brady, Bagley, Kyles* issue is to make a *Brady* request in writing. Although *Kyles* imposes upon the prosecution a duty to disclose, and *Bagley* adopts the same materiality standard regardless of whether the defense has made a general request, a specific request, or no request (*see Bagley* at 494), the reality is that the more fervently a defense lawyer fights to get exculpatory or impeachment evidence, the more egregious a prosecutor's refusal or failure to do appears. A form discovery motion filed upon getting the case should request exculpatory and impeachment materially, generally.

However, upon learning more about the facts of the case, counsel should use the benefit of his knowledge to target specific discovery items. Upon learning that a confidential informant was used, a request for the C.I.'s criminal record should be automatic. Upon learning there is a co-defendant, a request for any written or recorded statement, and/or the substance of any oral statement – whether inculpatory to that co-defendant or exculpatory to your client – should be requested. Remember that the evidence does not have to be evidence that clears your client of any charges; it becomes exculpatory if it shows that your client is less culpable than he would otherwise be thought to be by a jury. *Brady* specifically stated that the evidence must be material to guilt *or punishment.* Any evidence which puts your client in a light favorable to other co-defendants is material, at least, to the relative punishments the jury has to consider giving all defendants.

### III. Conclusion of Part One

So ends the discussion of "what you get." Others reading this article may immediately think of other items of discovery to which you are entitled upon request. If so, send them to me at the address below. Whether I agree with them or not, I will reprint thoughtful responses in a future article, perhaps as a sidebar to Part Two or Three of this series.

*Next issue: Part Two: What You* Might *Get* ■

**Brian "Scott" West**
**Assistant Public Advocate**
**907 Woldrop Drive**
**Murray, KY 42071**
**Tel: (270) 753-4633 Fax: (270) 753-9913**

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# Kentucky Case Law Review

*Shannon Dupree*

***Wicks v. Commonwealth***
***__S.W.3d__ (8/3/01)***

Ms. Wicks entered a conditional guilty plea to the offense of first-degree assault. She appealed from the portion of the court's judgment denying her motion that she be found to be a victim of domestic violence.

Wicks and Hawthorne (her boyfriend) lived together, and on the day in question the two were on their front porch drinking beer. Several women stopped to visit and Wicks became jealous. At one point, Wicks went inside the home and got a razor blade. She came back outside, grabbed Hawthorne's head, pulled it back and slit his throat with a razor. Hawthorne survived the attack.

As part of the plea agreement with the Commonwealth, Wicks stipulated Hawthorne did not commit any act of domestic violence against her *on the day of the incident*. The plea agreement also provided that the Commonwealth would recommend to the trial court a sentence of ten years to serve and that Wicks would ask for a domestic violence hearing which would be opposed by the Commonwealth.

At the domestic violence hearing, the court found Wicks had been a victim of domestic violence perpetrated by Hawthorne on previous occasions. However, since she had stipulated that domestic violence was not part of the offense for which she was being sentenced, the court denied her motion for a finding pursuant to KRS 439.3401(5) that she was a victim of domestic violence.

KRS 439.3401(5) deals with parole for violent offenders (violent offenders shall not be released on parole until he has served at least 85% of the sentence imposed). The statute does not apply "to a person who has been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with regard to the offenses involving the death of the victim or serious physical injury to the victim."

Wicks challenged the trial court's finding that she had suffered domestic violence perpetrated by Hawthorne in the past, but that she did not qualify as a victim of domestic violence under KRS 439.3401(5).

The Court of Appeals relied on *Springer v. Commonwealth*, Ky., 998 S.W.2d 439 (1999) in affirming the trial court's findings. The exemption from the parole restrictions in KRS 439.3401 applies only if the domestic violence and abuse was "involved" in the offense. Thus, the Court held Wicks must serve at least 85% of her sentence since the court determined she was not a victim of domestic violence with regard to the offense with which she was charged.

***Walker v. Commonwealth***
***__S.W.3d__ (8-23-01)***

George Walker appealed his conviction of first-degree trafficking in a controlled substance, tampering with physical evidence, and second-degree persistent felony offender.

Walker's trafficking charge was based on the police discovering him in the bathroom trying to flush away a packet of crack cocaine during a search of Freddie Brooks' residence. The warrant for the search was obtained after Robert Minter entered Brooks' house and paid Walker $20.00 for a baggy of crack cocaine. Minter had been previously arrested by police for driving without a license and possession of crack cocaine. Minter agreed to assist the police in exchange for avoiding prosecution.

Prior to trial, Walker moved to exclude any evidence that he had sold an illegal substance the day before the search warrant was executed. The Commonwealth stated that it would not introduce the evidence; the Commonwealth reiterated this position in response to Walker's motion to discover the identity of the confidential informer (Minter) who allegedly purchased cocaine from Walker. The Commonwealth twice more reaffirmed that it would not use evidence of the controlled buy at Walker's trial, before reversing its position six days before trial. The Commonwealth predicated this reversal due to their inability to find a witness they had planned to call. This witness had also recanted her story.

Walker objected on the grounds that the controlled buy evidence was inadmissible under KRE 404(b). Additionally, Walker moved for a continuance, in the alternative, in order to prepare for the witness. The trial court ruled that the evidence was admissible only to show Walker's intent to sell and denied the continuance.

On appeal, Walker first argued that the trial court should have excluded the evidence of the controlled buy under KRE 404(b). The Court held that the trial court admitted the controlled buy evidence to show Walker's intent to sell. The Court noted that the defense predicated its strategy on discrediting the Commonwealth's witnesses in order to create reasonable doubt as to both possession and intent to sell. The Court held this attack on the sufficiency of the evidence placed the issue of intent to sell into dispute. The Court also noted that the defense of "mere presence" at a crime is addressed in *United States v. Thomas*, 58 F.3d 1318 (8th Cir. 1995). The 8th Circuit notes "Because {the} "mere presence"

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defense raises the {} issues of intent and knowledge, admission of … prior bad act evidence {is} not relevant solely to a propensity inference, and {is} therefore proper under Rule 404(b). *Id*. at 1322, 1323.

In determining the relevance of the controlled buy evidence, the Court held that it tended to make it more probable that Walker intended to sell drugs in his possession.

The Court disregarded Walker's argument that *Marshall v. Commonwealth*, Ky., 482 S.W.2d 765 (1972) requires reversing the case at bar. The Court distinguished *Marshall* by pointing out that the Marshall Court concluded that the probative value of the other crimes evidence was scant in relation to its potential for undue prejudice. In the case at bar, the Court found that the evidence of the controlled buy related directly to the question of Walker's intention as to the cocaine the jury found Walker to be in possession of. Also, the trial court tempered the prejudice by properly admonishing the jury. Thus, the control-buy evidence was permissible under KRE 404(b) and KRE 403.

Walker next argued the Commonwealth failed to provide reasonable notice under KRE 404 of its intent to use the controlled buy evidence at trial. The Court disagreed, noting that defense counsel was able to question Minter at the hearing, and that the existence of a confidential informant (Minter) and the allegation of an illegal sale of drugs was not unknown to the defense.

Walker argued that a great deal of irrelevant evidence concerning the circumstances surrounding the search of Freddie Brooks' house and evidence concerning the quantity of drugs, drug paraphernalia, and use of drugs was admitted against him. The Court noted that there was no objection to the evidence when it was introduced, thus the issue was not preserved. The Court held that, "The error, if any, is not palpable."

In dissent, Justice Stumbo took issue with the finding that no palpable error existed from what she described as "the inclusion of an enormous amount of irrelevant evidence." Justice Stumbo argued that the evidence of other drugs at Freddie Brooks' house was irrelevant, and even if it were relevant, it should not have been admitted due to its highly prejudicial nature. Believing that "the verdict may have been different but for the inclusion of this evidence" and citing to *Abernathy v. Commonwealth*, Ky., 439 S.W.2d 949 (1969), Justice Stumbo found palpable error in admitting the irrelevant testimony regarding the drug dealing transactions in the Brooks' household.

***Viers v. Commonwealth***
***__S.W.3d__(8-23-01)***

Appellant Wathen E. Viers III was convicted of first-degree trafficking in a controlled substance and second-degree persistent felony offender. Sentenced to twenty years' imprisonment, the judgment credited Viers with 981 days of prior jail time. Three and one-half years later, the trial court entered an amended judgment that stripped Viers of all his jail time credit.

The trial court concluded that it had jurisdiction to amend the judgment as a "clerical error" under RCr 10.10. The Court of Appeals affirmed that ruling. The Kentucky Supreme Court held that the amended judgment involved a judicial error rather than a clerical error and, therefore, reversed.

The Court of Appeals relied on *Cardwell v. Commonwealth*, Ky., 12 S.W.2d 672 (2000) in affirming the trial court. In *Cardwell*, the trial court was allowed to enter an amended judgment that the defendant's ten-year sentence and five-year sentence be served consecutively. The Supreme Court held this amended judgment permissible as a correction of a clerical error under RCr 10.10. Thus, the amended judgment "did no more than correct the judgment to accurately reflect the oral judgment pronounced by the trial court at sentencing." *Id*. at 674. The Supreme Court distinguished *Cardwell* from the case at bar in that the 981 days of jail time credit was reflected in both the written and oral judgment.

The Supreme Court also noted that the error was not "clerical", but "judicial", taking it out of the meaning of RCr 10.10. The error, if any, arose in the compilation of information for the pre-sentence report. Citing to *Presidential Estates Apartment Associates v. Barrett*, 917 P.2d 100, 103 (Wash. 1996), the error can only be clerical if the amended judgment embodies the trial court's oral judgment as expressed in the record. As the amended judgment in the case at bar did not reflect the oral judgment, the error was judicial, not clerical. Citing to *H.E. Butt Grocery Co. v. Pais*, 955 S.W.2d 384, 388 (Tex. App. 1997) that, "An incorrectly rendered judgment cannot be altered when the written judgment precisely reflects the incorrect rendition," the Kentucky Supreme Court held the trial court erred in amending its judgment as the correction of clerical error under RCr 10.10.

***J.D.K. v. Commonwealth***
***__S.W.3d__(8-17-01)***

On November 18, 1999, J.D.K., then fourteen, pled guilty in Jefferson District Court, Juvenile Session, to two counts of sodomy in the first degree and two counts of sexual abuse based upon inappropriate sexual conduct perpetrated upon his nine-year old sister and her eight-year old friend. The Jefferson District Court required J.D.K. to give a blood sample to be compiled in the state's centralized DNA database pursuant to KRS 17.170(1). The Court of Appeals reversed and remanded, concluding that the lower courts erred in applying the provisions of KRS 17.170 to the appellant.

KRS 17.170(1), the specific section of the statutory scheme at issue in this case, identifies those who are required to provide blood samples for inclusion in the database as follows:

> Any person convicted on or after July 14, 1992, of a felony offense under KRS Chapter 510 or KRS

> 530.020, shall, or who is in the custody of the Department of Corrections on July 14, 1992, under KRS Chapter 510 or KRS 530.020 may, have a sample of blood taken by the Department of Corrections for DNA (deoxyribonucleic acid) law enforcement identification purposes and inclusion in law enforcement identification databases.

J.D.K. argued that he did not come within the reach of KRS 17.170(1) in that he had never been "convicted" of any crime. J.D.K. relied on KRS 635.040, which forbids a juvenile adjudication from being treated as a conviction for any purpose. J.D.K. also argued that he was not convicted or adjudicated guilty of a felony. The Court of Appeals held that KRS 635.040 nullified the Commonwealth's attempt to characterize J.D.K.'s adjudication as a "conviction." The Court of Appeals also agreed that there is "no legitimate basis for treating (J.D.K.'s) juvenile court adjudication as a conviction—much less as a felony conviction—for purposes of the DNA database."

***Richardson v. Commonwealth***
***__S.W.3d__(9/14/01)***

On April 10, 1987, the Madison Circuit Court sentenced Roy Dale Richardson to six years in prison for the offense of receiving stolen property valued at over $100 and for being a second-degree persistent felony offender. Richardson remained free on bond while his case was on appeal. On June 3, 1988, a panel of the Court of Appeals rendered an opinion affirming Richardson's conviction and sentence.

Due to oversight, Richardson was allowed to remain free until October 18, 1991. In early 1995, while on parole, he was arrested for new offenses and sentenced to seven and one-half years in prison. Richardson was paroled in 1998, but his parole was revoked in June 1999. On January 13, 2000, he filed a motion to vacate his sentence. The trial court, treating the motion as one to vacate the judgment and sentence pursuant to RCr 11.42, denied Richardson's motion.

Richardson argued that the trial court misconstrued his motion as an attack on the judgment of conviction through RCr 11.42. Richardson claimed he was simply seeking credit for the three years and ten days he was not in jail while following the finality of the opinion of the Court of Appeals. The Court of Appeals, after reviewing Richardson's motion, noted that it made no mention of seeking credit for the time at liberty toward the service of his sentence. The Court of Appeals ruled that if Richardson's motion was a RCr 11.42, it was untimely. If the motion was to be construed as one requesting credit toward the service of his sentence, it is nonetheless without merit.

The Court of Appeals distinguished *Green v. Commonwealth*, Ky., 400 S.W.2d 206 (1966), a case upon which Richardson relied. Green held "unreasonable delay" had occurred in the imposing of sentencing. *Id.* at 209. The Court of Appeals distinguished it on two levels. First, RCr 11.02(1) was clearly applicable but not followed by the trial court in Green. Second, the appellate court in Green found the delay "purposeful" and not accidental. *Id.* at 209.

Richardson also argued that he was entitled to credit against his sentence for the time he was erroneously at liberty due to the negligence on behalf of the government and due to no fault of his own. Richardson also argued that the government waived the execution of the sentence due to the court's failure to notify him that his conviction had been affirmed and that he was to start serving the sentence. The Court of Appeals found no Kentucky cases directly on point, but found *Commonwealth v. Blair*, 699 A.2d 738 (Penn. 1996) to be persuasive. Blair held that "(w)e will not allow the court system's inadvertent error to cancel any part of Blair's punishment for the crimes for which he was justly convicted and sentenced. Society has an interest in knowing that its criminals are serving the punishment to which they have been sentenced, regardless of an unintended delay or negligent error attributable to the government." *Id.* at 743. The Court finally held that the government's actions were not so wrong or so grossly negligent that fundamental fairness was violated.

***Darden v. Commonwealth***
***__S.W.3d__(8/23/01)***

Marcus T. Darden was convicted in Todd Circuit Court of possession of a controlled substance in the first degree (enhanced by possession of a firearm), possession of a weapon on school property, and possession of marijuana. The Court of Appeals affirmed the conviction. The Supreme Court reversed and remanded the case to Todd District Court. Darden argued that the trial court erred in allowing the case to be transferred from juvenile court to circuit court because unlawful possession of a firearm was not actual use of a firearm and does not satisfy KRS 635.020(4). KRS 635.020 lists several criteria to be met before a child can be tried as an adult in circuit court. Subsection (4) allows the case to be transferred to circuit court if: 1) the child is charged with a felony; 2) the child is fourteen (14) years old; and 3) a firearm was used in the commission of that felony. According to the Commonwealth, the act of possessing the weapon is the illegal act itself and constitutes "use in the commission of the offense" as required by KRS 635.020(4). The Commonwealth argued that because Darden was charged with the felony of possession of a firearm on school property, a violation of KRS 527.070, the statute which allows him to be tried in circuit court was automatically activated.

The Supreme Court held this result to be "illogical and entirely against the intent of the legislature." The Court relied on *Haymon v. Commonwealth*, Ky., 657 S.W.2d 239 (1983), which held the term "use of a weapon" in a burglary statute was ambiguous, and defendants were entitled to the benefit of the ambiguity.

The Supreme Court also pointed out that doubts in the construction of a penal statute are to be resolved not only in

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favor of lenity, but also against a construction that would produce extremely harsh or incongruous results. *Commonwealth v. Colonial Stores, Inc.*, Ky., 350 S.W.2d 465, 467 (1961). The Court argued that the harsh interpretation of the statute that the Commonwealth proposes is clearly not what the legislature intended.

Justice Wintersheimer, in a dissent joined by Justice Lambert, believed that the ambiguity in language that existed in *Haymon* did not exist in the case at bar. The dissent also believed that the intent of the legislature was to deter the presence of weapons on school property.

***Cornelison v.Commonwealth***
***Commonwealth v. Decker***
***__S.W.3d__(8-23-01)***

On April 26, 1999, Gilbert Cornelison was stopped, agreed to and failed a field sobriety test, and was arrested. Over an hour later, he was administered a Breathalyzer test which indicated his blood alcohol content was 0.274. Cornelison initially pled not guilty to operating a motor vehicle while under the influence-third offense, and for operating a motor vehicle while license is suspended for DUI-second offense.

Cornelison moved the Madison Circuit Court to declare KRS 189A.010(4) unconstitutional. Denied, Cornelison entered a conditional plea of guilty, appealing the DUI conviction to the Court of Appeals, contending that the 1998 amendment to KRS 189A.010(4) was unconstitutional. The Court of Appeals denied the claim and the Supreme Court then reviewed.

Cornelison's first argument took issue with the legislature's designation of blood alcohol of 0.18 as being the "magical level" beyond which a third-time offender is treated as a felon. The Court held that Cornelison had the burden of demonstrating the arbitrariness of the statute, and failed to do so.

Cornelison's next argument contended the statute violated the equal protection clause of the U.S. and Kentucky Constitution. Citing *Commonwealth v. Howard*, Ky., 969 S.W.2d 700, 702 (1998), the Court pointed out that the juvenile DUI statute, KRS 189A.010(1)(e) did not violate equal protection under rational basis analysis. The Court analogized that the 1998 amendment to KRS 189A.010(4) was in response to the "serious and growing societal problem of drunk driving." Thus, there was a reasonable basis for the classification.

Cornelison finally argued that, if the purpose of the statute was to protect society from drivers with intoxication levels of 0.18 or more, all offenders whose BAC reaches that level should be subject to the increased penalties. The Court relied on the broad discretion given to the legislature to determine rational basis, citing the question in *Commonwealth v. Harrelson*, Ky., 14 S.W.3d 541, 548 (2000) that "(t)he rational basis argument can be paraphrased as 'Is there a good reason to adopt a law?'" The Court concluded such a good reason existed, and found that the statute passed Constitutional muster.

Donald Decker, indicted in July 1999 on one count of operating a vehicle while under the influence of alcohol-third offense, and one count of operating a motor vehicle while license is suspended or revoked for driving, successfully petitioned the Jefferson Circuit Court to issue an order holding KRS 189A.010(4) unconstitutional. As the Court believed the questions raised in this case are answered in Cornelison's case, it vacated the order of the Jefferson Circuit Court and remanded the case for further proceedings. ■

**Shannon Dupree**
**Appellate Branch**
**100 Fair Oaks Lane, Ste. 302**
**Frankfort, Kentucky 40601**
**Tel: (502) 564-8006;**
**Fax: (502) 564-7890**
**E-mail: ssmith@mail.pa.state.ky.us**

Nothing in the world can take the place of persistence. Talent will not; nothing is more common than unsuccessful men with talent. Genius will not; unrewarded genius is almost a proverb. Education will not; the world is full of educated derelicts. Persistence and determination alone are omnipotent.

- Calvin Coolidge

# 6th Circuit Review

*Emily Holt*

**Hunt v. Mitchell**
2001 U.S. App. LEXIS 18793 (6th Cir. 8/22/01)

The facts of this case are unbelievable. Mr. Hunt was arrested for injuring his pregnant wife during an argument. He remained in jail until an indictment was returned **87 days** after his arrest. Two days after the indictment was returned, Hunt was arraigned and appointed an attorney, King. Immediately after arraignment the trial judge told Hunt and King that trial would begin immediately or Hunt would have to waive any speedy trial claim under Ohio law. The judge would not even allow counsel 10 minutes to consult with Hunt to see if a plea bargain might be possible.

Voir dire began immediately, and testimony began the next day. King noted for the record his misgivings about going to trial so fast. After the State presented testimony of 3 police officers, the trial court granted a 10-day continuance so the State could locate Mr. Hunt's wife. The trial ended the day it continued, and the jury convicted Hunt of all counts on which he was indicted. Both the Ohio Court of Appeals and the federal district court refused to grant relief. The 6th Circuit reverses the district court and grants Hunt's petition for writ of habeas corpus because the Ohio Court of Appeals unreasonably applied clearly established Supreme Court precedent.

**Counsel Appointed Day of Trial: Prejudice Presumed**

On habeas review, the Court concludes that the 6th amendment to effective assistance of counsel was violated. Appointment of an attorney on the day of trial, which results in no opportunity to consult with a client or prepare a defense, can be presumed to be prejudicial. Counsel's actual performance at trial is irrelevant. *Powell v. Alabama*, 287 U.S. 45 (1932) and *U.S. v. Cronic*, 466 U.S. 648 (1984). This rule of law was clearly established when the Ohio Court of Appeals, the last court to actually consider the merits of Hunt's claim, considered Hunt's appeal in 1996. Further, the Ohio Court of Appeals acknowledged in Hunt's appeal that *Cronic* represented the standard of ineffective assistance of counsel.

***Per Se* Violation of Right to Counsel: No Objection Required**

The Ohio Court of Appeals refused to grant relief because of its belief that Hunt's attorney failed to note his objection to last-minute appointment of counsel. However, defense counsel did preserve the issue by objecting to the fast track of the trial. Furthermore, no objection was even required in that "a per se violation of a defendant's right to effective assistance of counsel does not require the defendant to preserved the error below." *Powell*, 287 U.S. at 57-58.

**Client Shouldn't Be Forced to Forego Effective Assistance of Counsel To Preserve Speedy Trial Claim**

Counsel was denied at a critical stage of proceedings in that defense counsel was unable to investigate the case. Pre-trial consultation with one's client is paramount to the preparation of a defense. Egregious circumstances also surrounded the appointment of counsel. Hunt "languished" in jail for 87 days before an indictment was returned. 2 days later he went to trial so Ohio would not lose a potential speedy trial claim by Hunt. The trial court would not let King speak to Hunt privately for even 10 minutes before voir dire began. The trial court effectively forced Hunt to surrender his right to effective assistance of counsel to preserve his right to a speedy trial. This is "intolerable." *Simmons v. U.S.*, 390 U.S. 377, 394 (1968). The Court also notes that the lack of preparation and consultation time was even more pronounced in this case which hinged upon Hunt's version of the facts versus the prosecution's version of events.

**Prejudice Not Cured by 10-Day Continuance**

Finally, the Court notes in a footnote that it rejects Ohio's claim that any prejudice was cured by the 10-day continuance. When the continuance was granted, voir dire had been conducted; opening statements had been given; and three prosecution witnesses had been cross-examined. Pre-trial preparation and consultation with Hunt would have been invaluable to all of these trial proceedings.

**Magana v. Hofbauer**
2001 U.S. App. LEXIS 19194 (6th Cir. 8/28/01)

**IAC Claim Where Counsel Gave Erroneous Legal Advice and, As a Result, Defendant Rejected Guilty Plea Offer**

Magana was convicted in Michigan state court of 2 drug offenses and was sentenced to 2 mandatorily consecutive terms of 10-20 years imprisonment. Magana claims ineffective assistance of counsel in that his attorney advised him to turn down the government's plea offer of a 10-year sentence based on the attorney's incorrect belief that the maximum to which Magana could be sentenced would be 2 **concurrent**

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10-year sentences. If he would have been told that he could be convicted of 2 mandatorily consecutive10-20 year sentences, Magana asserts he would have accepted the plea bargain. Both state courts and the federal district court denied relief. The 6th Circuit reverses.

**Petitioner First Must Prove Trial Counsel's Performance Was Deficient**

In *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985), the U.S. Supreme Court applied *Strickland v. Washington*, 466 U.S. 668 (1984), to counsel's advice during the plea-bargaining process, and held that a petitioner who asserts trial counsel was ineffective for encouraging him to plead guilty must prove (1) counsel's performance was deficient and (2) there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." The 6th Circuit has held that a viable IAC claim exists when trial counsel encourages a client to reject a plea and proceed to trial. *Turner v. Tennessee*, 858 F.2d 1201, 1205-1206 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989), *reinstated on other grounds*, 940 F.2d 1000, 1002 (6th Cir. 1991).

The 6th Circuit notes that the state courts never discussed whether trial counsel's performance was deficient. The Court assumes that they concluded counsel's performance was deficient in that "it would be hard to imagine how Wartella's [trial counsel] advice during the plea negotiation process could have been more inadequate." Wartella erroneously believed that the sentences for the drug offenses could not be run consecutively, when, in actuality, they had to be run consecutively. He told Magana the maximum term of imprisonment he could get would be only 10 years. Wartella expressly told Magana that "he was going to get 10 years whether he went to trial or didn't go to trial." This is obviously incorrect as Magana got 20 years. Wartella's performance was deficient and easily fell below an objective standard of reasonableness.

**Reasonable Probability "But For" Counsel's Advice, Petitioner Would Have Plead Guilty**

The Michigan Court of Appeals' conclusion that Magana could not prove prejudice was "an unreasonable application" of *Strickland* and *Lockhart*. The Michigan Court concluded that Magana must prove with absolute certainty that Magana would not have accepted the offer had it not been for Wartella's deficient performance. This is the incorrect standard as *Strickland* and *Lockhart* only require a "reasonable probability" that the outcome would have been different. The state courts held Magana to a higher standard.

Finally, the Court concludes that Magana had demonstrated a "reasonable probability" that he would have plead if Wartella had given him the correct information about the sentencing laws. Magana said he was sure he would have plead guilty if he had been told that the sentences would have been stacked. In addition to Magana's statements, the Court notes that Magana rejected a 10-year sentence for a 20-40 year term. "It does not strain reason to believe that Magana would have chosen a flat ten-year sentence instead of risking a possible forty-year term."

**Jacobs v. Mohr**
2001 U.S. App. LEXIS 19971 (6th Cir. 9/10/01)

**IAC as "Cause" For Procedural Default of Substantive Habeas Claim**

This habeas case involves the question of whether ineffective assistance of trial counsel (in this case failure to inform the petitioner of his right to an appeal) can serve as cause for procedural default of the principal habeas claim (whether a confession was legally obtained). This case also conveys an important message to trial attorneys—you must inform the client of her right to an appeal and take any necessary steps to get the appeals process rolling!

**IAC Claim Itself Cannot be Procedurally Defaulted**

The Court first notes that for ineffective assistance of counsel to serve as cause for the procedural default of the underlying confession issue, the ineffective assistance of counsel claim cannot itself be procedurally defaulted. *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000). Jacobs first asserted the IAC claim in 1992 in his petition for post-conviction relief with the trial court. Specifically he asserted that his trial counsel was ineffective for failing to file the notice of appeal and he cited to relevant 6th Circuit case law in support of this claim. Thus, the claim of ineffective assistance of trial counsel in failing to help Jacobs secure an appeal was "fairly presented" to the state trial court. Unfortunately on appeal of the denial of post-conviction relief to the Ohio Court of Appeals, Jacobs abandoned this claim. The 6th Circuit notes that it is irrelevant that the Court of Appeals remarked on both the trial court and trial counsel's failure to notify Jacobs of his appeal—the question is whether the petitioner "fairly presented" his claim. Because Jacobs procedurally defaulted the claim of ineffective assistance of counsel in notifying him of his right to appeal, it cannot serve as "cause" to excuse his procedural default on the underlying confession issue.

**Ineffective Assistance if Trial Attorneys Do Not Help Clients Appeal**

Furthermore, even if the IAC claim had not been procedurally defaulted, it still could not have served as cause for default on the confession issue because trial counsel's performance was not ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). In 1962, when Jacobs' trial was held, *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), had been decided. *Griffin* only

held that when a state grants appellate review, it cannot do so "in a way that discriminates against some convicted defendants on account of their poverty." The Court did not speak about trial counsel or the trial court's responsibility to notify a defendant of the right to an appeal or appellate counsel until 1963 in *Douglas v. California*, 372 U.S. 353, 355 (1963). Thus, it was not until the year after Jacobs' trial that a reasonable attorney representing an indigent defendant at trial would have reason to either continue representation on appeal or advise of the procedure in which appellate counsel could be appointed.

**Greene v. Tennessee Department of Corrections**
2001 U.S. App. LEXIS 19782 (6th Cir. 9/7/01)

**§ 2241 Petition: Must Obtain Certificate of Appealability**

In this case, the Court simply holds that a state prisoner incarcerated pursuant to a state conviction who seeks habeas relief under § 2241 must obtain a certificate of appealability (COA) before appealing to the 6th Circuit.

Greene was sentenced to 99 years imprisonment in 1971. In 1994, Greene filed a petition for writ of habeas corpus under § 2241 after Tennessee state courts rejected his contention that he should be immediately released from incarceration because he had earned sentence credits at a rate of 49.5 days per month since incarceration. The district court granted the state's motion for summary judgment and denied a certificate of appealability. Greene appealed anyway. Greene's argument is essentially that a petitioner only must obtain a COA when state court action is being complained of, and in his case, he is challenging the legality of state administrative agency proceedings. The 6th Circuit rejects this argument and joins the 5th and 10th Circuits in holding that a state prisoner who appeals the resolution of any § 2241 petition must obtain a COA.

**In Re: Michael A. Clemmons**
259 F.3d 489 (6th Cir. 8/1/01)

***Apprendi* Has Not Been Made Retroactive to Cases on Collateral Review**

Clemmons was convicted of a drug conspiracy involving cocaine and cocaine base. He is petitioning the 6th Circuit for permission to file a second motion to vacate under § § 2244 and 2255. He claims the district court violated his rights under *Apprendi v. N.J.*, 120 S.Ct. 2348 (2000), when it and not the jury determined the amount of drugs attributable to him for sentencing. Clemmons argument is that *Apprendi* "is a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable to him" and he is thus entitled to file a second or successive petition. The 6th Circuit rejects this claim.

Clemmons was convicted in 1994. It is undisputed that at that time it was acceptable for the trial court, and not the jury, to determine the amount of drugs attributable to a defendant prior to sentencing. *Apprendi*, rendered in 2000, radically changed the law as it make the quantity of drugs an element of the offense rather than a mere "sentencing factor." The jury must determine the amount of drugs beyond a reasonable doubt. *Apprendi* has been applied to cases on direct appeal but it has not yet been applied retroactively in the 6th Circuit to cases on collateral review.

The key question is whether *Apprendi* has been "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2244(b)(3)(C). The 6th Circuit looks to a recent U.S. Supreme Court case, *Tyler v. Cain*, 121 S.Ct. 2478 (2001), to determine what that phrase really means. In *Tyler*, a state prisoner was asserting in a second habeas action that a new rule regarding jury instructions articulated in *Cage v. Louisiana*, 298 U.S. 39 (1990), was "made retroactive to cases on collateral review by the Supreme Court." The Supreme Court held that it must expressly hold that its decision is retroactive to cases on collateral review for a second or successive petition to qualify for consideration. The Court has not yet done so as to *Apprendi*.

**Steverson v. Summers**
258 F.3d 520 (6th Cir. 7/25/01)

Steverson was convicted of three counts of being a felon in possession of a firearm in 1998. He sentence was enhanced by 3 expired state court convictions and sentences. He filed a § 2254 habeas petition attacking the state convictions that were used to enhance his federal sentence. The dismissal of his petition by the district court is affirmed as he does not meet the "in custody" requirement of habeas petition as the sentences of the convictions he seeks to challenge have expired.

**"In Custody" Means Petitioner Must be "In Custody" Under Conviction or Sentence Being Attacked in Petition**

In *Maleng v. Cook*, 490 U.S. 488, 490-491 (1989), the Supreme Court interpreted the § 2254 custody requirement to mean that the petitioner must be "'in custody' under the conviction or sentence under attack at the time his petition is filed." The Court specifically stated that a petitioner does not remain "in custody" after a sentence has expired merely because that sentence is used to enhance a later sentence. In *Maleng*, the petitioner was a federal prisoner. He was attacking an expired state sentence used to enhance state sentences that he would begin serving when released from federal custody. The Court allowed him to proceed on the merits, liberally construing the petition as an attack on a state sentence that had not yet begun to be served. In the case at bar, liberal construction such as that which occurred in *Maleng* is not available since Steverson is not subject to any unexpired state sentences.

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**Generally, Petitioner Cannot Challenge a Conviction Whose Sentence Has Expired by Attacking Current Enhanced Sentence**

*Maleng* left unanswered the question of whether a habeas petitioner can challenge the constitutionality of a state conviction whose sentence has expired by facially attacking a current sentence enhanced by the prior state conviction. Two recent Supreme Court cases, *Daniels v. U.S.*, 121 S.Ct. 1578 (2001) and *Lackawanna County District Attorney v. Coss*, 121 S.Ct. 1567 (2001), essentially, with one narrow exception, foreclose this possibility. In *Daniels*, a federal prisoner was determined to be an armed career criminal and received an enhanced sentence as a result of prior state robbery convictions. He sought habeas relief under § 2255, alleging that the robbery convictions were unconstitutional because the underlying guilty pleas were not entered knowingly and voluntarily. In *Coss*, a state prisoner sought § 2254 relief, alleging prior, expired, state convictions, which affected his current state sentence, were the result of ineffective assistance of counsel. The U.S. Supreme Court ruled in both *Daniels* and *Coss* that habeas relief is unavailable under § 2254 or § 2255 for prisoners attempting to challenge prior conviction when that prior conviction used to enhance the current sentence is "no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully). . . ."

**2 Possible Exceptions to *Coss-Daniels* Rule: Failure to Appoint Counsel & No Channel of Review Was Available to Defendant as to Expired Conviction**

There are 2 possible exceptions to the general rule announced in *Daniels* and *Coss*. First, when the "prior conviction used to enhance the sentence was obtained where there was a failure to appoint counsel in violation of the Sixth Amendment, as set forth in *Gideon v. Wainwright*, 372 U.S. 335 (1963)." Plurality opinions from both *Coss* and *Daniels* suggest there may be another exception: where "no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own." *Daniels*, 121 S.Ct. at 1584. In *Coss*, 121 S.Ct. at 1575, a plurality listed some examples of that possible exception. When a state court refused to rule on a constitutional claim that was properly presented or when a defendant, after direct and collateral review has expired, obtains "compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner."

**U.S. v. Laster and Lear**
258 F.3d 525 (6th Cir. 7/26/01)

**Business Records Exception to Hearsay Rule: Witness Must be Familiar With Record-Keeping System**

James Acquisto, a state detective, received information from Universal Testing Incorporated (UTI) that an employee (Laster) had ordered hydriodic acid, a component of methamphetamine, from Wilson Oil Company using the UTI company name. After investigation, Laster and Lear, an accomplice, were charged with various drugs charges and eventually convicted.

The district court admitted purchase records from Wilson Oil Company under the business records exception of FRE 803(6). Acquisto was found to be a qualified witness under FRE 803(6) and was permitted to lay the foundation upon which the records were admitted. KRE 803(6) is analogous to the federal rule. Both Lear and Laster argue the evidence was inadmissible hearsay. The records included four Wilson Oil Company invoices reflecting sales of chemicals and a chemical diversion letter signed by Laster referencing the sale of hydriodic acid to UTI by Wilson Oil Company.

Lear and Laster argue that Acquisto was not qualified to admit the records under the business records exception. He never examined the books or ledgers of Wilson Oil nor did he know if they had an accountant or bookkeeper. He also did not know if the documents were prepared simultaneously with transactions reflected. Thus, Lear's and Laster's argument is that Acquisto had no personal knowledge or familiarity with Wilson Oil Company's record-keeping system.

*U.S. v. Hathaway*, 798 F.2d 902, 906 (6th Cir. 1986), requires that if a government agent or other individual outside the organization establishes the foundation for business records to be admitted, he or she must be "familiar with the record-keeping system." Acquisto was not sufficiently familiar with record-keeping system of Wilson and the evidence was thus inadmissible under FRE 803(6). Nevertheless, the Court holds the evidence would still be admissible under the federal residual exception rule, FRE 807. Kentucky does not have a residual exception rule.

**Meaning of Federal Residual Exception Rule in Dispute**

FRE 807, the residual exception rule, allows a hearsay statement "not specifically covered by FRE 803 or 804"to be admissible when it is (1) material, (2) "more probative on the point for which it is offered than any other evidence which the proponent was procure through reasonable efforts, and (3) admission serves the interests of justice."

Judge Nelson writes a strong dissent critical of the majority's interpretation of the federal residual hearsay exception. She would interpret it not to apply where evidence would **not** be admissible under FRE 803 or 804. Thus, in the case at bar, the evidence would not be admissible under FRE 807 since it is

inadmissible under FRE 803. In other words, "it applies to those exceptional circumstances in which an established exception to the hearsay rule does not apply but in which circumstantial guarantees of trustworthiness, equivalent to those existing for the established hearsay exceptions, are present."

**U.S. v Suarez**
2001 U.S. App. LEXIS 17667 (6th Cir. 8/8/01)

This case is a blow to the right to counsel during custodial interrogation. Suarez is a former Dearborn, Michigan police officer. He was a bunco investigator and specialized in "traveling criminal groups." He was a nationally renowned for his expertise on Gypsy crime. He was convicted of converting police evidence and victim restitution money to his own benefit. He worked with a Gypsy informant, Miller, to identify and arrest suspects. They would then work out restitution agreements with the victims where the suspects would return at least some of the money or property in exchange for dropping the charges. At some point, Suarez apparently also began to "take care of cases" for Gypsies for a fee. He also took property seized from a raids of Gypsy businesses and pawned it or sold it to other Gypsies.

**Fact that Suspect Has Attorney Waiting For Him at Police Headquarters Does Not Unambiguously Assert His Right to Counsel**

One of Suarez's claims on appeal involves the trial court's failure to suppress statements he made at the time of his arrest. On October 1, 1997, the FBI confronted Suarez at the Dearborn Police Station. The president of the local police union, Corporal Huck, told him he was getting him a police union lawyer. Suarez said, "Ok." Huck arranged for attorney Peter Gravens to meet him at FBI headquarters in Detroit. Huck told Suarez that an attorney would be at headquarters when he arrived. Suarez was then given his Miranda warnings and signed a written waiver of rights, and was then asked during his ride to FBI headquarters if he wanted to speak, and responded, "Yes I want to clear this up." Suarez then made various statements. He moved to suppress the statements on the ground that he had asserted his right to counsel. The trial court denied the motion.

When a defendant has unambiguously requested the assistance of counsel, the police cannot initiate custodial interrogation. Statements obtained in violation of this rule must be suppressed. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). It is undisputed that the interrogation was initiated by the FBI. At least some of the FBI agents in the car knew Suarez had union legal representation waiting for him at headquarters. Nevertheless the 6th Circuit concludes Suarez never told the police directly of his "desire to deal with the police only through counsel." *U.S. v. Doherty*, 126 F.3d 769, 775 (6th Cir. 1997). "The mere fact that the government is aware that a suspect has an attorney, or is soon to have one, does not unambiguously assert the suspect's right to deal exclusively with the police during custodial interrogation." The Court states "Suarez's mere acknowledgment of Huck's actions [by saying "OK" in response to his telling him of the hiring of union counsel] is not an 'unequivocal request for counsel.'... A reasonable police officer could have interpreted the events to mean that Suarez had not yet made a choice as to whether to deal with police *exclusively* through counsel."

**U.S. v. Mack**
258 F.3d 548 (6th Cir. 7/26/01)

**404(b) Evidence**

Mack was convicted of various bank robbery charges. On direct review, he asserts that the trial court erred when it allowed the government to present evidence of a subsequent unindicted bank robbery (May 6, 1998 robbery) as "similar acts" evidence under FRE 404(b). Kentucky's 404(b) rule is analogous to the federal rule. For "similar acts" evidence to be admissible it must be probative of a relevant fact and not be used to show character or propensity to commit bad acts. *U.S. v. Clemis*, 11 F.3d 597, 600 (6th Cir. 1993). This "similar acts" evidence was offered to prove identity. Unlike the 9 bank robberies at issue in the current case, Mack does not dispute that he committed the May 6 robbery and actually plead guilty to it in state court.

**Unindicted Bank Robbery Sufficiently Similar in that there is a "Signature"**

In determining the May 6 robbery was sufficiently similar to the robberies charged in the indictment the trial court found 3 elements that "constituted a 'signature' due to their uniqueness": (1) use of a ski mask and a hooded sweatshirt; (2) "always burst into the bank and leaped over the teller counter" and (3) "then leaped over the counter again to leave." The 6th Circuit rejects Mack's claim that these items are conduct common with standard bank robberies and thus cannot constitute a signature. "[S]tandard conduct, although not particularly unusual by itself, may, in combination, present an unusual and distinctive pattern constituting a 'signature.'" Furthermore, although some dissimilarities do exist between the May 6 robbery and the robberies charged "such dissimilarities represented a refinement of Defendant's technique, or resulted from the witnesses' differing observations or perspectives; not from a material difference in the acts themselves."

**Prejudicial for Jury to Hear About High-Speed Chase But Harmless Error**

Mack claims that the evidence was more prejudicial than probative. Mack is specifically objecting to the fact that the jury heard not only about the May 6 robbery itself, but also about

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a "resulting high speed police chase involving seven or eight police cruisers." The 6th Circuit agrees with Mack that error did occur in allowing testimony regarding the high speed police chase. "In our opinion, the details of the high speed chase were of little assistance to the jury in determining identity in this case as it was undisputed that Defendant committed the May 6 robbery. Furthermore, none of the robberies charged in the indictment involved a high speed chase." Because of the overwhelming evidence of guilt, however, the error was harmless. Also, limiting instructions informing the jury only to consider the evidence for the purpose of determining whether there were similarities so as to suggest identity also worked to dispel any harm.

**U.S. v. Langan**
2001 U.S. App. LEXIS 19271 (6th Cir. 8/30/01)

**Admission of Expert Testimony on Eyewitness Identification**

This case is rather confusing and complex as it pertains to a number of bank robberies and assaults on federal officers. For our purposes, only the issue of expert testimony on eyewitness identification will be addressed.

Langan led a small white-supremacist group known as the "Aryan Republican Army," or the ARA. This group committed bank robberies in the mid-1990s to support their purpose of committing terrorist attacks on the U.S. government.

One of the robberies the ARA carried out was on October 25, 1994, at the Columbus National Bank. Langan and one compatriot, Richard "Wild Bill" Guthrie, entered the bank wearing ski masks, construction overalls, hard hats, sunglasses, and gloves. They shouted Spanish phrases in order to fool the victims into thinking they were Hispanic. One of the men controlled customers in the lobby while the other brandished his gun and jumped over the teller counter to collect the money. As he took money from the drawer, he removed his mask, hard hat, and sunglasses and left them on the counter. The bank's assistant manager, Lisa Copley, later ID'ed Langan as the robber who collected the money. She testified at trial that she could see him clearly for 3 seconds as he took money from the tellers' drawers. She said she was 4 feet away from him when he took off the disguise but was within "touching distance" as he emptied the drawers. She saw him another time when he returned to where she was after trying to steal money from the drive-thru window. She described him after the incident as a white male in his mid-thirties, weighing 165 lbs, 5'8" tall, clean-shaven with dark hair and medium build.

In January 1996, Langan was finally arrested in Columbus, Ohio. His arrest was the result of a "dramatic confrontation" that was televised on local news stations. Ms. Copley testified at trial that she saw the television coverage and "when she saw the report, she instantly thought Langan was the same man who had robbed CNB" over a year earlier. On March 18, 1996, Copley was interviewed by an FBI agent and was shown a photo line-up. She told the agent she had seen coverage on TV about Langan's arrest. She then said, " I hope I don't recognize this individual from T.V." When shown photos, she did not hesitate in picking Langan. It was the first and only photo she selected from the line-up.

Pre-trial Langan filed a motion to exclude Copley's testimony. He also filed a motion in the alternative to present expert testimony of Dr. David Ross, a psychologist at the University of Tennessee, regarding eyewitness identification to undermine Copley's testimony. Both motions were ultimately denied, although the court did hold a suppression hearing at which Dr. Ross testified regarding factors that could affect the accuracy of the Copley identification. Factors were the 14-month delay between the robbery and the photo line-up, distractions such as the gun and the stress of the situation, and Copley's exposure to Langan on the news. The FBI's identification procedures in showing Copley the photo array were also criticized. Ross also was willing to testify as to a process called "conscious inference" in which a familiar and innocent person is misidentified, in this case because Copley recognized Langan from TV, not, under Ross' theory, from the CNB robbery.

Under *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), the trial court determined that Copley's identification was sufficiently reliable and Langan failed to prove the line-up was impermissively suggestive. Further the court refused to allow Ross' testimony as it determined that it failed to meet FRE 702 (KRE 702 is identical) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Specifically the court found that the testimony would not aid the jury, but would actually invade the jury's province. Further, the "conscious inference" theory was not sufficiently based on "scientific knowledge" because it failed to meet *Daubert* reliability standards. Further Ross' methodologies were unsound in that in connection with this theory a victim or eyewitness of a bank robbery had never been studied. Finally, the court noted that while Ross was a recognized expert in child eyewitness identification, he was not in the area of adult eyewitness identification. The trial court did give the jury an eyewitness identification instruction that told the jury of various factors to be considered when weighing Copley's testimony and cautioned the jurors to carefully consider the shortcomings and trouble spots of identification.

**Broad Discretion Given to Trial Court Regarding Admission of Expert Testimony on Eyewitness Identification**

On direct appeal, the 6th Circuit applies an "abuse of discretion" standard of review to the trial court's exclusion of Dr. Ross' testimony regarding the danger of eyewitness testimony. The Court first notes that the 6th Circuit has tradition-

ally been more hospitable to expert testimony on eyewitness identification than many of its sister circuits. *See U.S. v. Smithers*, 212 F.3d 306 (6th Cir. 2000). However, all circuits, even those like the 6th Circuit that are open to its use, do give the district court broad discretion in "first, determining the reliability of the particular testimony, and second, balancing its probative value against its prejudicial effect."

In the case at bar, the trial court did not automatically exclude Dr. Ross' testimony. It only did so after a *Daubert* hearing. Further, the court "pointedly distinguished the circumstances presented in Langan's case from those in *U.S. v. Smith*, 736 F.2d 1103 (6th Cir. 1984)" where the 6th Circuit held a trial court had abused its discretion in excluding expert witness testimony on eyewitness identification. The trial court found it noteworthy in the case at bar that what Dr. Ross would testify to was "already within the jury's own knowledge." Further, the "conscious inference" theory was, even in Dr. Ross's own words, "empirically unproven." Under *Daubert*, 509 U.S. at 593-595, the theory needed empirical support, subjection to peer review, and general acceptance in the field of eyewitness identification.

The 6th Circuit does fault the district court for questioning Ross' ability to qualify as an expert because the bulk of his experience has been in the area of child eyewitness identification. The 6th Circuit notes that Ross had "published articles, edited books, and given lectures dealing specifically with misidentification in adult witnesses." The Court concludes that a "specific qualification in 'adult eyewitness identification' is unjustified unless there exists some principled distinction between the methods, theory, and results in the study of misidentification by adults as opposed to misidentification by children."

**Hazards of Eyewitness Identification Normally Already Within Purview of Jurors**

Finally the Court concludes "the hazards of eyewitness identification are within the ordinary knowledge of most lay jurors." Cross-examination gave Langan the opportunity to "thoroughly cross-examine Copley in order to cast doubt on her ability to identify him." The Court also notes that Copley's identification shows indicia of reliability. For example, because of Ms. Copley's service as an aviation electronics technician with the Air Force National Guard, she received training "in identifying individuals attempting to enter authorized areas." Distracting factors may affect her less than other people. Furthermore, a substantial amount of evidence other than the eyewitness identification links Langan to the crime.

**U.S. v. Wright**
260 F.3d 568 (6th Cir. 8/3/01)

On October 6, 1993, a Wal-Mart in Memphis, Tennessee, was destroyed by fire. ATF investigator John Mirocha determined that arson caused the fire. In the course of this investigation, Mirocha learned there had been a previous fire on October 1, 1993, at the same Wal-Mart. The local fire lieutenant—not a trained fire investigator—had determined that electrical wiring caused that fire. Mirocha examined the electrical system, however, and determined that it was not the origin of either the October 1 or October 6 fire. Mirocha photographed and documented the electrical wiring evidence. It was then destroyed.

Almost 4 years later, Wright was indicted for the October 6 fire. He filed a motion to dismiss the indictment claiming that the investigators violated his due process right to exculpatory evidence when they destroyed all physical evidence from the scene of both the October 1 and October 6 fires. This motion was denied. Wright appeals this denial as he was subsequently convicted of arson.

**Destruction of "Potentially" Exculpatory Evidence: Bad Faith Must be Shown**

*California v. Trombetta*, 467 U.S. 413 (1982), and *Arizona v. Youngblood*, 488 U.S. 51 (1988), are the 2 primary Supreme Court cases dealing with exculpatory evidence. In *Trompetta*, the Court held that due process rights are violated where material exculpatory evidence is not preserved. For evidence to be constitutionally material, it "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable available means." *Trompetta*, 467 U.S. at 488-489. Bad faith on the part of the government is irrelevant if the evidence is constitutionally material. *Id.*

On the other hand, *Youngblood* deals with evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Youngblood*, 488 U.S. at 57. Bad faith on the part of the government must be proven by the defendant. *Id.*, 58. Bad faith depends on the government actor's "knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.*, 56.

**Destruction of "Potentially" Useful Evidence: 6th Circuit Requires a Showing that Comparable Evidence Cannot Be Obtained**

Furthermore, in *U.S. v. Jobson*, 102 F.3d 214, 218 (6th Cir. 1996), the 6th Circuit determined that when potentially useful information is at issue, bad faith alone is not enough to violate due process rights of the defendant. *Jobson* mandates that "once a defendant demonstrates bad faith and that the exculpatory value of evidence was apparent before its destruction. . . he or she must also demonstrate an inability to obtain comparable evidence by other reasonable available means." Also, the 6th Circuit in *Jobson* held gross negligence is not

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enough to satisfy the "bad faith" prong.

In the case at bar, the Court analyzes this as a "potentially useful" evidence case. Wright has failed to prove bad faith on the part of the government investigators. "The record contains no allegation of official animus toward Wright or of a conscious effort to suppress exculpatory evidence." Furthermore, the Court notes that the physical evidence was essentially over 120,000 square feet of retail and warehouse space that would have been difficult to preserve.

Judge Gilman concurs with the result. He, however, believes that *Jobson* misapplies *Trompetta* and *Youngblood* in that, in his opinion, under *Jobson* there is no longer a distinction between materially exculpatory and potentially exculpatory evidence.

**U.S. v. Crozier and Burton**
259 F.3d 503 (6th Cir. 8/2/01)

**Admission of Pre-trial and In-court Identifications**

On November 26, 1995, two armed robbers robbed a Rite-Aid Drug Store in Clinton, Tennessee. They took numerous controlled substances. During the robbery, one of the men repeatedly asked Katrina DeBusk, a pharmacist, the location of numerous drugs. Several days later, she helped police officers prepare a composite sketch of the one of the suspects (not the one she talked with) in about 15 minutes. Police worked on a sketch of the other suspect for about 2 hours, but could not prepare one to satisfy DeBusk.

A month later, DeBusk and Shelly Simonds, the only other Rite-Aid employee in the store during the hold-up, separately identified Burton as one of the robbers from a photo line-up. The Clinton Police Department uses black and white photos but had obtained one of Burton from the Lexington, Ky., Police Department that uses color photos. Thus, Burton's photo was the only colored one in the photo line-up. On March 6, 1998, both DeBusk and Simonds identified Burton as the perpetrator from a "live" line-up.

Burton argues the district court erred when it failed to suppress DeBusk's and Simonds' pre-trial and in-court identifications of him. "A conviction based on identification testimony must be overturned 'whenever the pretrial identification procedure is so 'impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *Simmons v. U.S.*, 390 U.S. 377, 384 (1968). The 6th Circuit employs a two-step analysis in determining whether an identification is admissible. *Ledbetter v. Edwards*, 35 F.3d 1062, 1070 (6th Cir. 1994). First, the Court considers whether the identification procedure was suggestive. If it was suggestive, the Court must determine whether, under the totality of the circumstances the identification was nonetheless reliable and therefore admissible. The 5 factors to be weighed in determining reliability are (1) the opportunity of the witness to view the perpetrator during the crime; (2) the witness's degree of attention to the perpetrator; (3) the accuracy of the witness's prior descriptions of the perpetrator; (4) the level of certainty demonstrated by the witness when identifying the suspect; and (5) the length of time between the crime and the identification. "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

**Suggestive to Include Color Photo of Defendant When Rest of Photos in Line-up Are Black and White**

The 6th Circuit determines that including a color photo of Burton with a grouping of black and white mug shots is suggestive. Nevertheless, under the totality of the circumstances, a sufficient indicia of reliability existed so as to admit both DeBusk's and Simonds' identification testimony. Both witnesses had a long time to view Burton. The robbery lasted 10 minutes and the stop was well-light. Burton was not in a disguise. An hour before the robbery, Simonds helped Burton find some cough drops. She said she took note of Burton because he was a stranger and she knows most of her customers. When he returned to rob the store, he approached her again and asked for help finding a card for his mother and then poked her in the back with a gun. DeBusk had an extended conversation with Burton about the location of the drugs in the store. While she was bound and lying on the floor, she had a clear view of Burton when she raised her head to speak with him.

Both Simonds and DeBusk had a heightened degree of attention to Burton because he confronted both of them directly. As to the accuracy of their prior descriptions, while there was some variation between DeBusk's description of Burton and Burton himself, it is not so strong so as to bar admission of her testimony. The fact that Simonds could not describe Burton cuts in Burton's favor that he was identified only because of the suggestive line-up. Both Simonds and DeBusk identified Burton within 5 seconds of viewing the photo lineup. Both also immediately picked him out of the live line-up. While the length of time between the robbery and the later photo line-up (1 month) and live line-up (more than 2 years) was lengthy, overall the suggestive nature of the photo line-up did not create a substantial likelihood of misidentification. ■

**EMILY P. HOLT**
**Assistant Public Advocate**
**Appellate Branch**
**100 Fair Oaks Lane, Ste. 302**
**Frankfort, KY 40601**
**Tel: (502) 564-8006; Fax: (502) 564-7890**
**E-mail: eholt@mail.pa.state.ky.us**

# PRACTICE CORNER
## LITIGATION TIPS & COMMENTS

*Misty Dugger*

**Make Sure Final Judgment Specifically Reflects the Agreed Upon Sentencing Terms Of Plea Agreement**

The Department of Corrections is bound to the specific terms of a judgment. Make sure the judgment is detailed as to the court's intended sentence and the interaction of the present sentence with any prior sentences received by the client. For example, the judgment should specify that the sentence is to run concurrent with the prior sentences imposed in case numbers ___-CR-___, ___-CR-___, and ____-CR-____. The final judgement should also specify that the defendant shall receive credit for all time served toward service of the maximum sentence imposed herein and defendant's total sentence shall be for a term of X years. For support see, *Lemon v. Corrections Cabinet*, Ky. App, 712 SW2d 370 (1986). This case demonstrates the importance of a specific judgment.

~Bob Hubbard, LaGrange Post Conviction Office

**Does Corrections Have A Duty To Follow The Specific Judgement Or Must They Run The Sentence Per Statute In Violation Of A Judgment?**

**Question:** Client enters plea agreement that multiple counts would run concurrent to current time being served, for a total term of five years. However, Department of Corrections reports that client has ten year term. The greater term is based upon statutory language that new convictions committed while on probation must run consecutive. Does Corrections have a duty to follow the specific language of the judge's orders or must they run the sentences per statute in violation of a judgment? What remedy is available?

**Answer:** A declaratory judgment action against Corrections may or may not work to remedy the situation and would depend on whether the final judgment was silent on the issue of concurrent versus consecutive sentences. The caselaw generally holds that when there is a silent judgment and statute mandates a consecutive sentence, Corrections has full authority to run a sentence as it should be run. This is despite the requirement that a silent judgment be construed as concurrent pursuant to KRS 532.110 (2). The rules of statutory construction factor into the analysis because of the more specific language of the subsequent statute requiring consecutive sentences. *See Riley v. Parke*, Ky., 740 SW2d 934 (1987).

If the judgment is not silent and Corrections is disobeying the judgment, there is a stronger case to be made for the defendant. In this situation, you have a judgment that reflects the terms of an agreement entered into by all parties and the question becomes whether Corrections has standing to avoid the "concurrent" directives of an otherwise lawful final judgment. One would argue that they do not have the authority to avoid the terms of the judgment. First, Corrections is not a party to the action. Corrections, in this context, are simply administrators who should enforce the judgments of the court. Second, Corrections is bound to follow the mandate of a lawful judgment unless and until the judgment is changed in due course of law. The thrust of any declaratory judgment action seeking injunctive relief would be to require Corrections from *sua sponte* changing the terms of a voidable but not void judgment.

~Bob Hubbard, LaGrange Post Conviction Office

**Make Sure That All Probation Provisions Are Reasonable**

**Question**: The Circuit Judge routinely sets as a condition of probation that the defendant cannot be charged with another offense. This of course leads to the scenario where a defendant on probation gets charged with a relatively minor offense or an offense where he is innocent and then finds himself serving out the remainder of a major felony sentence. What are some good ways to protect the client?

**Answer:** Generally, conditions of probation must be reasonable. 21A Am.Jur.2d, Criminal Law, § 907. Kentucky law codifies this requirement at KRS 533.030. There, the court is directed to only impose those conditions that it deems "reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." KRS 533.030(1). Similarly, apart from a list of specified conditions that are permitted by statute, the court is permitted to impose "any other reasonable condition . . .." KRS 533.030(2). Probation should not be revoked because the defendant failed to comply with an unreasonable condition of probation. 21A Am.Jur.2d, Criminal Law, § 913. See also *Keith v. Commonwealth*, Ky., 689 S.W.2d 613, 615 (1985) ("having conferred that status [of probation] on the appellant it is fundamentally unfair to deprive him of his liberty for reasons beyond the appellant's control . . . .")

In your case, it sounds like the judge is imposing an unreasonable condition, in that it is entirely outside the defendant's control whether he is or isn't charged. As such, the condition violates not only the above cited law, but also vests absolute and arbitrary power in the defendant's friends, neighbors, local police, and anybody else who could file a charge on the defendant, since so doing will be a probation violation. There is nothing wrong with requiring the defendant to follow all laws, and the Commonwealth can secure revocation on the grounds that the defendant broke the law, even if they couldn't prove the violation beyond a reasonable doubt. However, there has to be at least some act on the defendant's part in order to violate probation.

~ Tim Arnold, Juvenile Post Disposition Branch, Frankfort

**If you have a practice tip, courtroom observation, or comment to share with other public defenders, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to Mdugger@mail.pa.state.ky.us.**

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